80-1239

No. _____

Office-Supreme Court, U.S.
FILED
JAN 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM G. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JURISDICTIONAL STATEMENT

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
(Counsel of Record)

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, NW
Washington, DC 20036
(202) 296-8500

Attorneys for Railway Labor Executives' Association

Date: January 21, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

In the opinion of appellant Railway Labor Executives' Association the following questions are presented by this appeal:

1. Did the Rock Island Reorganization Court abuse its discretion in enjoining an Act of Congress intended to provide immediate protective benefits to needy Rock Island Railroad employees where there was no valid showing that the estate would be irreparably harmed while the parties complied with an Act of Congress which Comgress has tw declared to be essential to the public interest?

2. Did Congress, by specifically providing that the Tucker Act remedy was available in this case, effectively preclude the conclusion that Section 106 of the Rock Island Transition and Employee Assistance Act effects an uncompensated taking of private property without compensation?

3. Does Congress, after concluding that the public interest requires adequate protection of railroad employees, have the power to establish the terms upon which a railroad in reorganization under Section 77 of the Bankruptcy Act may withdraw its assets from the business of providing interstate rail transportation?

4. Was the Rock Island Reorganization Court correct in concluding that the public interest no longer remains an important part of its exercise of jurisdiction under Section 77 of the Bankruptcy Act?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	17
CONCLUSION	30
Appendix A — Decision of Seventh Circuit	1a
Appendix B-1 — Order of the United States District Court October 15, 1980	3a
Appendix B-2 — Order of the United States District Court October 16, 1980	7a
Appendix C — Excerpts From the Transcript of Proceedings October 7, 1980	9a
Appendix D — Preliminary Injunction dated June 9, 1980	13a
Appendix E — Partial Transcript of Proceedings of June 9, 1980	15a
Appendix F — Transcript of Proceedings on Motion to Reconsider Preliminary Injunction of June 9, 1980	23a
Appendix G — Judgement of the Seventh Circuit	31a
Appendix H — Notice of Appeal	33a
Appendix I — Constitutional Provisions and Statutes Relied Upon	35a
Appendix J — *RLEA* v. *Gibbons,* Sup. Ct. No. A-1135, decided June 28, 1980 (Statement of Stevens, J., in Chambers)	43a
Appendix K — List of RLEA Member Organizations	49a

TABLE OF AUTHORITIES

CASES: PAGE

Brooks-Scanlon Co. v. *Railroad Commission*, 251 U.S. 396 (1920) 25

Chicago, R.I.&P.R. — Abandonment, ICC Docket AB-46 (Sub-No. 22), issued May 27 5

Coffman v. *Breeze Corporations, Inc.*, 323 U.S. 316 (1945) 22

Directed Service Order No. 1398, 360 I.C.C. 289 (1979) ... 6

Ecker v. *Western Pac. Ry.*, 318 U.S. 448 (1943) 7, 20, 28

Hurley v. *Kincaid*, 285 U.S. 95 (1932) 22, 23, 25, 29

In re Lehigh Valley R., 558 F.2d 137 (3rd Cir. 1977) 7, 26

ICC v. *Railway Labor Executives' Assoc.*, 315 U.S. 373 (1942) 27

New Haven Inclusion Cases, 399 U.S. 392 (1970) 26

New Motor Vehicle Board v. *Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J.; in chambers) 22

Parker v. *Levy*, 417 U.S. 439 (1974) 4

Reconstruction Finance Corp. v. *Denver & R.G.W.Ry.*, 328 U.S. 494 (1946) 25

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 20,22, 23, 25, 29

RLEA v. *Gibbons*, Sup. Ct. No. 80-415 ..... 2, 11, 16

RLEA v. *Gibbons*, 65 L.Ed. 2d 1094 (1980) (Stevens, J.; in chambers), *upheld*, 65 L.Ed. 1140 (1980) 2, 4, 12, 17, 22

United States v. *Lowden*, 308 U.S. 225 (1939) 25, 27

Wellsville, A.&G.R.—Abandonment, 354 I.C.C. 744 (1978) 27

Williams v. *Zbaraz*, 442 U.S. 1309 (1979) (Stevens, J.; in chambers) 22

Table of Authorities Continued

CONSTITUTIONAL MATERIALS: PAGE

Commerce Clause, Art. 1, § 8, cl. 3 26

Fifth Amendment, U.S. CONST. 5, 15, 23, 25

STATUTES AND OTHER MATERIALS:

Bankruptcy Act

§77, 11 U.S.C. §205 ..... 2, 7, 20, 25, 26, 27, 28

§77(d), 11 U.S.C. §205(d) 7

Bankruptcy Code, Pub.L. No. 95-598, 11 U.S.C. §101, *et seq.* 2

11 U.S.C. §1170(e)(1) 21

11 U.S.C. §1172(c)(1) 21

Bankruptcy Rule 8-303, Chapter 8 Rules 7

126 Cong. Rec. H8619 (September 9, 1980) 17

Emergency Railroad Transportation Act of 1933, 48 Stat. 211 (1933) 27

Executive Order No. 12,159, 44 Fed. Reg. 54687 (Sept. 21, 1979) 6

H.R. 6837, 96th Cong. 2d Sess. 9

H.R. 7235, §227, 96th Cong. 2d Sess., 126 Cong. Rec. H8608 (Sept. 9, 1980) 13

H. Rpt. No. 96-1430, 96th Cog. 2d Sess. (1980) 13, 14, 18, 20, 27, 28

H. Rpt. No. 96-1041, 96th Cong. 2d Sess. (1980) 10, 18, 19

H. Rpt. No. 96-839, 96th Cong., 2d Sess. (1980) . 10, 18, 27, 28

Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*

49 U.S.C. §10901 26

49 U.S.C. §10903(b)(2) 25, 26, 27

49 U.S.C. §11125 9

49 U.S.C. §11347 ..... 8, 27

Table of Authorities Continued

STATUTES AND OTHER MATERIALS:	PAGE
Milwaukee Railroad Restructuring Act, 45 U.S.C. §901, *et seq.*	8
Section 5, 45 U.S.C. §904	21, 27
Section 9, 45 U.S.C. §908	9
Section 17, 45 U.S.C. §915	8, 18, 19, 21, 25, 27, 28
Railway Labor Act, Section 10, 45 U.S.C. §160	6
Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, Section 802	27
Railroad Unemployment Insurance Act, 45 U.S.C. §351, *et seq.*	8
Rock Island Transition and Employee Assistance Act, Pub.L. No. 96-254, 45 U.S.C. §1001, *et seq.*	*in passim*
Section 102, 45 U.S.C. §1001	18
Section 106, 45 U.S.C. §1005	*in passim*
Section 110, 45 U.S.C. §1008	*in passim*
Section 124(a)(1), 45 U.S.C. §1018(a)(1)	3, 13, 16
Section 124(b), 45 U.S.C. §1018(b)	13
Section 124(c), 45 U.S.C. §1018(c)	5, 13, 22, 29
S. 2253, 96th Cong., 2d Sess.	9
Staggers Rail Act of 1980, Pub.L. No. 96-448	2
Section 701	13, 14
28 U.S.C. §1252	3, 13, 16
28 U.S.C. §2101(a)	17
Tucker Act, 28 U.S.C. §1491	12, 13, 20, 21, 22, 23, 25, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM G. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JURISDICTIONAL STATEMENT

This appeal brings to this Court for the second time in less than one year questions concerning the validity of preliminary injunctions enoining enforcement of Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act [herinafter, "RITA"], 45 U.S.C. §§1005, 1008, provisions which were intended to provide immediate aid to employees of the Chicago, Rock Island and Pacific Railroad Company [herinafter, "CRI" or "Rock Island"] who were adversely affected by the reduction of Rock Island operations.

Those provisions were initially enjoined on June 9, 1980, within days after RITA was enacted, and after first Mr. Justice Stevens and then this Court denied appellant Railway Labor Executives' Association's [herinafter, "RLEA"][1] request to stay that preliminary injunction pending RLEA's appeal (*RLEA* v. *Gibbons*, Sup. Ct. No. 80-415), Congress reconsidered the challenged provisions. On October 14, 1980, the Staggers Rail Act of 1980 [herinafter, "SRA"], Pub.L. No. 96-488, was enacted, and by Section 701 of that Act Congress modified Section 110 and reenacted with changes Section 106 of RITA. However, by an order dated October 15, 1980, the CRI reorganization court, a District Court sitting as a railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. §205,[2] concluded without any explanation that Sections 106 and 110 of RITA, as amended, still effected an unconstitutional taking of private property, and thus, enjoined enforcement

---

[1] Appellant Railway Labor Executives' Association is a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees. The member organizations of RLEA are listed in Appendix K, attached hereto. The Trustee of the CRI; the First National Bank of Chicago and the Continental Illinois National Bank and Trust Company of Chicago, as indentured Trustees; and Henry Crown, *et al.*, as shareholders initiated this action by filing an adversary proceeding action against the United States of America, the Interstate Commerce Commission [hereinafter, "ICC"] and the Honorable Neil Goldschmidt, Secretary of Transportation. RLEA, an intervenor in the reorganization proceeding, participated as an active party in the hearings on this matter.

[2] Section 77 of the Bankruptcy Act has been repealed by the Bankruptcy Code of 1978, Pub.L. No. 95-598, but that repeal is not effective for cases which were pending under that section before its repeal. Section 403(a), Pub.L. No. 95-598.

of those reenacted provisions. Appellant RLEA took an appeal to the United States Court of Appeals for the Seventh Circuit pursuant to Section 124(a)(1) of RITA, as amended, 45 U.S.C. §1018 (a)(1), but on December 16, 1980, that Court, sitting *en banc*, affirmed the October 15, 1980 order by an equally divided court without an opinion. This appeal pursuant to 28 U.S.C. §1252 has followed.

OPINIONS BELOW

On December 16, 1980, the United States Court of Appeals for the Seventh Circuit issued an unpublished order affirming by an equally divided court the appealed injunctive order of the United States District Court for the Northern District of Illinois; that court of appeals order in which three judges voted to reverse and three judges voted to affirm is reproduced herein as Appendix A. The Judgment accompanying that order and affirming the October 15, 1980 injunctive order is reproduced herein as Appendix G. The injunctive order affirmed by the court of appeals is dated October 15, 1980, and is unreported; it is reproduced herein as Appendix B-1, whereas Appendix B-2 is the unpublished minute order of the reorganization court dated October 16, 1980, modifying the October 15, 1980 order. Appendix C is a reproduction of the oral remarks of the CRI reorganization court by which that court, on October 7, 1980, stated its tentative conclusions on various motions by appellant RLEA and the Government to vacate the earlier injunctive orders in view of the passage of the SRA amendments to Sections 106 and 110 of RITA.

The earlier preliminary injunction was issued by the CRI reorganization court on June 9, 1980, and is unreported; it is attached hereto as Appendix D. Appen-

dix E hereto is a reproduction of the unreported oral statement given by the reorganization court when it granted the June 9th injunction reporduced as Appendix D. On June 20, 1980, the reorganization court denied a motion by the United States, joined by RLEA, to reconsider its order of June 9, 1980; that unreported oral opinion is attached hereto as Appendix F.[3]

JURISDICTION

This case involves an appeal from an order of the United States Court of Appeals for the Seventh Circuit affirming an interlocutory order which held that portions of an Act of Congress were unconstitutional, and which preliminarily enjoined agencies of the federal government, as well as the Rock Island Trustee, from complying with certain commands of that Act. Appellant RLEA respectfully submits that this Court has jurisdiction over this appeal by virtue of 28 U.S.C. §1252. *Accord*, *Parker* v. *Levy*, 417 U.S. 439 (1974). The order and judgment of the court of appeals from which this appeal has been taken were issued on December 16, 1980, and appellant RLEA filed with that court on December 19, 1980, its notice of appeal to this Court. A copy of that notice of appeal is reproduced herein as Appendix H.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the validity of two (2) provisions of RITA, as amended by the SRA, *i.e.*, Sections

---

[3] On June 28, 1980, Mr. Justice Stevens, with a written statement, denied an application by RLEA for a stay of the June 9th preliminary injunction; that statement is reported at 65 L.Ed.2d 1094 (1980), and is reproduced herein as Appendix J. On July 2, 1980, the full Court, by a majority vote with one Justice abstaining, upheld that denial; its order is noted at 65 L.Ed.2d 1140 (1980).

106 and 110, 45 U.S.C. §§1005, 1008; those provisions, both as originally enacted and as amended, are set forth in Appendix I, hereto. Those provisions were asserted to be contrary to the commands of the Fifth Amendment to the Constitution of the United States; that Constitutional amendment is reproduced herein as part of Appendix I. Section 124(c) of RITA, as added by the SRA, 45 U.S.C. §1018(c), is also involved in this case; Section 124 is set forth in Appendix I.

STATEMENT OF THE CASE

Chartered in 1847, the Rock Island grew during the one hundred and thirty-four (134) years of its existence into one of the largest railroads in this country operating over 10,000 miles of track in 1979 and employing in 1978 a work force which totaled over 10,000 employees. However, by 1975 the railroad's financial plight was such that on March 17, 1975, it petitioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205. Thereafter, the CRI continued to operate for more than four and a half (4 1/2) years, and even though it operated under the protection of Section 77, the railroad continued to sustain operating losses, and its traffic base continued to erode. *Chicago, R.I.&P.R.—Abandonment*, ICC Docket AB-46 (Sub-No. 22), issued May 27, 1980, slip op. at 9, 15. The Rock Island's rapidly deteriorating financial position was exacerbated by the severe winter of 1978-79, which not only dramatically increased its losses, but also damaged its physical plant. *Id.* Consequently, by the summer of 1979, the future of the Rock Island, to say the least, was not bright, and its creditors and shareholders were clamoring increasingly for its liquidation.

After several unsuccessful attempts to resolve certain contract negotiating disputes, one of the largest labor organizations representing Rock Island employees struck that railroad on August 28, 1979, and one day later, a second labor organization also struck that carrier. Once the railroad was struck by the two labor organizations, the Trustee "locked-out" the striking employees and abolished the positions of its other organized employees; the Trustee then attempted to operate a truncated system with non-union personnel. On September 20, 1979, however, the President of the United States created an Emergency Board to investigate those disputes pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. §160. *Executive Order No. 12,159*, 44 Fed. Reg. 54687 (Sept. 21, 1979).

Several days after the Emergency Board was created, the ICC concluded that the Trustee could not commence operations because the CRI was cashless, and using its emergency powers under 49 U.S.C. §11125, the ICC directed the Kansas City Terminal Railway Company [herinafter, "KCT"] to operate "vitrually all" of the Rock Island's lines. *Directed Service Order No. 1398*, 360 I.C.C. 289, 290-92 (1979). On September 27, 1979, the CRI reorganization court denied the Trustee's oral application for authority to continue operating the system, and on October 5, 1979, directed service operations began over most of the CRI by the KCT. Those operations basically ended in late March 1980, and since that time portions of the Rock Island are being operated by other carriers under provisions of RITA, and some of the other portions of the system have been sold.

To this date, the Rock Island has not resumed operations, and in light of events since early 1980, the chances of that carrier ever resuming operations as they

previously existed are rapidly diminishing. On January 25, 1980, the CRI reorganization court concluded without the benefit of a report from the ICC under 11 U.S.C. §205(d), that the railroad was unreorganizable, and refused to transmit the Trustee's plan of reorganization to the ICC as mandated by Bankruptcy Rule 8-303. Instead, that court ordered the Trustee to plan for the liquidation of the debtor.[4] Thereafter, the reorganization court began to authorize certain acts on the part of the Trustee designed to accomplish liquidation of the estate by either abandonment of lines or sales of Rock Island property to interested purchasers. On June 2, 1980, the reorganization court, asserting that since its liquidation order of January 25, 1980, the public interest in continuation of the Rock Island has been outweighed by the interests of the creditors in protection of their financial interests, authorized the abandonment of the entire Rock Island system, subject to a delay in abandonment of those lines which the ICC had concluded were essential to the public interest.[5] That Court, however, refused to condition its abandonment order upon a requirement that the carrier provide protections for employees who may be affected by the abandonment, even though Sec-

[4] Appellant RLEA has taken an appeal from the liquidation order to the United States Court of Appeals for the Seventh Circuit (No. 80-1353) on the ground, *inter alia*, that a Section 77 reorganization court does not have jurisdiction to order or to control a liquidation of a railroad in reorganization under Section 77. *See, Ecker* v. *Western Pac. R.*, 318 U.S. 448 (1943); *In re Lehigh Valley R.*, 558 F.2d 137 (3rd Cir. 1977). Oral argument was heard on December 8, 1980, and that appeal is still pending.

[5] On June 9, 1980, RLEA appealed that abandonment order to the United States Court of Appeals for the Seventh Circuit (No. 80-1788). On August 4, 1980, an appeal by the United States from that order was docketed with the Seventh Circuit (No. 80-2075). Those appeals are still pending.

tion 17(a)(1) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. §915(a)(1), by its express terms, mandated that such an abandonment order be so conditioned.[6]

Rock Island employees, as the record in this case clearly shows, were in need of the protections mandated by Section 17(a) of the MRRA in June 1980, and that need continues to this day, except that it is greater. In 1978, the Trustee employed 10,749 people to operate the CRI; 6,389 of those employees had been employees of the CRI for ten (10) years or more, and 1,590 of those long time workers had been with the Rock Island for thirty (30) or more years. By August 1979, the number of Rock Island employees had dropped to 9,713, and by December 1979, that number had further declined to 8,407. By June 1980, only 2,641 Rock Island employees were shown as having been retained in the various operations over CRI lines; by that time, 2,557 other Rock Island employees were receiving benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. §351, *et. seq.*, 43 other employees who were unemployed had exhausted their benefits under that Act, some employees had retired, and many others were unaccounted for. The number of unemployed Rock Island employees increased over the summer of 1980, and by September 1980, 3,704 Rock Island workers were drawing Railroad Unemployment Insurance Benefits—*i.e.*, a maximum of $25 per

---

[6] Section 17(a) of the MRRA transferred from the ICC to the reorganization court the jurisdiction to authorize an abandonment of a bankrupt carrier's rail lines, and it provided in Section 17(a)(1) as follows:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. §11347]. . . .

45 U.S.C. §915(a)(1).

day for ten (10) days during each fourteen (14) day registration period.

In early 1980, Congress began to consider legislation to cover the Rock Island situation, including provisions to continue without interruption essential rail services then being provided under 49 U.S.C. §11125, and to assure that Rock Island employees were not left destitute by the liquidation of the railroad. *E.g.*, S.2253, 96th Cong., 2d Sess; H.R. 6837, 96th Cong., 2d Sess. Title I of the legislation enacted and signed into law on May 30, 1980, as Public Law No. 96-254, dealt with the Rock Island and in Sections 105 through 110 included provisions intended to assure that Rock Island employees, who are unable to secure employment on a permanent basis with rail carriers purchasing Rock Island lines, would not be deprived of minimum protections.

Section 106 of RITA (*i.e.*, Title I of Pub. L. No. 96-254) was patterned after Section 9 of MRRA, 45 U.S.C. §908, and, as the House report explained:

> [P]rovides that the representative of the Rock Island Trustee and representatives of the Rock Island employees, with the assistance of the National Mediation Board, shall negotiate an employee protection arrangement within ten days of enactment. Should those negotiations prove unsuccessful, the ICC will impose, not later than 30 days after enactment, a fair and equitable arrangement no less protective of the employees than under section 9 of the Milwaukee Railroad Restructuring Act. The employee protection payments shall be administrative expenses as they were under section 9(d) of the MRRA . . . . The ICC, in imposing protection, shall consider benefits including moving expenses, separation allowances, health insurance benefits and other benefits, subject to the $75 million limitation. Because litigation may result

> from this provision, the bill provides for an expedited litigation procedure.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 22 (1980).

Congress carefully drafted the legislation to provide for an expeditious implementation of an arrangement to protect Rock Island employees and in the Conference Report on this legislation, the conferees noted in reference to Section 106:

> This section *mandates early implementation* of employee protection to avoid disruption of rail service and undue displacement of employees. The conferees intend that if no agreement is reached within the initial 10-day period and the ICC prescribes an agreement, the bankruptcy court will take whatever actions are appropriate and necessary for the immediate implementation of such agreement, *so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments. The conferees believe that legislation is essential to provide for an orderly transition.*

H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980) (emphasis added).

Shortly after RITA was enacted, the Trustee along with the principal creditors and shareholders of the debtor filed a twenty-six (26) page Complaint with the reorganization court on June 5, 1980, seeking both a judgment declaring the entire Act unconstitutional, and an injunction enjoining its enforcement. A hearing on the Trustee's and creditors' request for interlocutory relief was conducted on June 9, 1980, before United States District Judge Frank J. McGarr sitting as the CRI reorganization court, and at the conclusion of that hearing the court ruled that those portions of RITA dealing

with an employee protection arrangement (*i.e.*, Sections 106 and 110) were unconstitutional as depriving the estate of property for a public purpose without just compensation, and possibly because they were a non-uniform bankruptcy act. The Court, without making specific findings of irreparable harm except concluding that the Act was unconstitutional, issued a preliminary injunction (1) enjoining the ICC from asserting jurisdiction to consider or to impose any employee protective arrangement, (2) enjoining the Trustee from entering into negotiations with labor representatives to arrive at an agreement under RITA, and (3) enjoining Secretary of Transportation Neil P. Goldschmidt from complying with obligations imposed by Section 110(a) of the Act.

On June 11, 1980, RLEA filed a notice of Appeal to this Court from that Order and on September 15, 1980, it perfected that appeal by filing its Jurisdictional Statement. That appeal (No. 80-415) is still pending. The United States also noted an appeal from the June 9th order; however, it did not perfect its appeal, but rather in December 1980 filed a pleading as an appellee in RLEA's appeal suggesting that the SRA amendments rendered RLEA's appeal from the June 9th order moot, and requesting that this Court note probable jurisdiction and vacate the injunction order.

On June 18, 1980, the United States filed a motion with the District Court requesting that court to reconsider its ruling of June 9, 1980, and to vacate the injunction. Appellant RLEA and the ICC supported that motion, but after hearing oral argument on June 20, 1980, the court denied those requests. In doing so, the court reiterated its earlier view that Sections 106 and 110 of RITA were unconstitutional for several reasons, but specifically enumerated only one such reason—*i.e.*, "any

imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." Appendix F at 30a.

Appellant RLEA filed with this Court on June 21, 1980, an application for a stay of that preliminary injunction, but on June 28, 1980, Mr. Justice Stevens denied that request with a written statement. After examining the pleadings filed with the application for a stay, Mr. Justice Stevens stated:

> . . . I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking or property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

RLEA v. *Gibbons, supra*, Appendix J at 47a. Mr. Justice Stevens then went on to note that since it was not clear that the Tucker Act, 28 U.S.C. §1491, was available, there was a "strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that are unconstitutional and unrecoverable . . . ." *Id.* Such a possibility was, according to Mr. Justice Stevens, "a sufficient showing of irreparable damage [so as] . . . to support the entry of the preliminary injunction." *Id.* On July 2, 1980, the full Court, with three Justices dissenting and one Justice abstaining, voted to deny that stay request. 65 L.Ed.2d 1140 (1980).

When it became apparent that litigation over the validity of Sections 106 and 110 of RITA would delay the immediate distribution of funds to needy Rock Island employees, Congress again considered that legislation. *E.g.*, H.R. 7235, §227, 96th Cong., 2d Sess., 126 Cong. Rec. H8608 (September 9, 1980). On September 30, 1980, Congress passed the Staggers Rail Act of 1980, and by Section 701 of that Act amended RITA. Section 701(a)(1) addressed the concern of this Court that the Tucker Act remedy might not be available to persons who believed they were deprived of property by virtue of RITA, and it added a new provision (Section 124, 45 U.S.C. §1018) which provided in subsection (c) that: "Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)." As Congress explained in its Conference Report to accompany the SRA, H.Rpt. No. 96-1430, 96th Cong. 2d Sess. at 138 (1980):

> By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

To assure further that there would be no delay in the distribution of funds to employees, Congress added as Section 124(a)(1) of RITA a provision which provided that "Notwithstanding any other provisions of law [*i.e.*, 28 U.S.C. §1252], any appeal from . . . any decision of the bankrupcty court with respect to the constitutionality of any provision of this Act . . . shall be taken" to the Seventh Circuit; and it added as Section 124(b) of RITA the requirement than any such appeal "involving section 106 or 110 of this title" be decided within sixty (60) days by that court sitting *en banc*.

Section 701(b)(1) of the SRA modified the provisions of Section 106 of RITA and reenacted that section. These modifications to Section 106 may readily be seen by examining Appendix I(2)(A), hereto, but basically the new provision established a shorter schedule for the negotiation or imposition of a protective arrangement (H.Rpt. No. 96-1430, *supra*, at 137), and it repealed the anti-stay and limited review features of the original provision. *Compare*, Section 106(d) of RITA, as originally enacted, *with* Section 106(d), as amended. Section 110 was also modified by the SRA, for Section 701(a)(2) added the words "to employees" immediately after "liability" in Section 110(e) of RITA, thus eliminating the contention that Section 110(e) removed the Tucker Act remedy.

Shortly after the SRA bill was sent to the President for his signature, appellant RLEA, the United States and the ICC asked the CRI reorganization court to vacate the June 9th injunction; appellant RLEA also requested that the court direct the Trustee to negotiate with labor to devise a protection agreement under Section 106(a). Appellant and the Government parties asserted that enactment of the SRA would moot the June 9th injunction, and that by expressly providing that the Tucker Act was available to the appellees, Congress eliminated appellees' claim of irreparable harm. Oral argument was held on those motions on October 7, 1980, and after listening to those arguments the reorganization court stated its tentative conclusions which were later finalized by the order dated October 15, 1980. As the court stated on October 7, 1980:

> The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the ir-

> reparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically . . . was an unconstitutional deprivation.

Appendix C at 10a. And as the court then added: "This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction." *Id.* at 11a.

On October 16, 1980, the reorganization court issued an order dated October 15, 1980, and entitled "Preliminary Injunction"[7]. Appendix B-1. In that order the court concluded that:

> The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

Appendix B-1 at 6a.

Appellant RLEA and the Government had argued that the reorganization court should not preliminarily enjoin enforcement of Sections 106 and 110 of RITA because the SRA amendments to RITA effectively eliminated any claim of irreparable harm. The court disagreed and concluded that the statutory scheme could not be implemented without causing "irreparable injury

---

[7] By an order dated October 16, 1980, the reorganization court modified its October 15th order to read that it was *continuing* the June 9th injunction in effect rather than issuing a *new* injunction. Appendix B-2 at 7a.

to the administration of the estate for the benefit of the creditors." Appendix B-1 at 5a. As the court explained:

> The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Id. at 5a. The court then issued the same form of injunctive order as it had issued on June 9th, and on October 16, 1980, appellant RLEA filed a notice of appeal to the Seventh Circuit pursuant to Section 124(a)(1) of RITA, as added by the SRA. The Government also took an appeal to that court from that order on October 29, 1980.

RLEA's and the Government's appeals were consolidated and were heard *en banc* on November 13, 1980. On December 16, 1980, the Court of Appeals issued an order affirming the order of the reorganization court by an equally divided court.[8] Appendix A. Because two Judges disqualifed themselves, only six Judges heard the appeal; three of the Judges who heard the appeals voted to reverse,[9] and three of the Judges voted to af-

---

[8] Appellees Trustee, creditors and shareholders moved to dismiss RLEA's appeal due to lack of jurisdiction by virtue of 28 U.S.C. §1252 and RLEA's appeal to this Court in No. 80-415. The full court stated that "in view of the Staggers Rail Act" the motion to dismiss the appeal should be denied. Appendix A at 2a. *See also, Gibbons* v. *RLEA*, Sup.Ct. No. 80-704.

[9] Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse.

firm.[10] No opinions were filed with that short order. Appellant RLEA filed with the Court of Appeals its notice of appeal to this Court on December 19, 1980, and this Jurisdictional Statement is being filed within the time period provided by 28 U.S.C. §2101(a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. History has shown that conflicts continue to arise over the separation of powers between the various branches of our Government, and as with the earlier aspects of this case, this appeal is another example of that conflict. To date, three different courts, including this Court, have passed on aspects of this case, and to date not one court, including the CRI reorganization court, has given a detailed explanation of where and why it believes Congress erred. Moreover, the split of opinion in the Court of Appeals, and indeed in this Court (*e.g.*, 65 L.Ed.2d 1140), indicates that the issues presented are substantial. Appellant RLEA respectfully submits that because of the grave national interests which are at stake, it is important that this Court determine whether Congress, or as RLEA submits, the reorganization court has overstepped its constitutional limits.

In early 1980, Congress began to examine the crisis caused to our nation's rail system by the decision to liquidate the Rock Island, and it concluded, as have both Congresses and the courts for the past half-century in similar circumstances, that it was vital to our national interests that Rock Island employees not be left destitute, but, rather, that their interests be considered and be protected by the reorganization court. *See generally*, 126 Cong. Rec. H8619 (September 9, 1980); H.Rpt. No.

[10] Judges Swygert, Bauer and Wood voted to affirm.

96-1430, *supra*, at 138-39. Congress, appellant RLEA submits, had provided such protections when in passing Section 17(a) of the MRRA, 45 U.S.C. §915(a), it required the reorganization court to provide adequate protection for employees in authorizing *any* abandonment. But because of questions which began to develop over whether the reorganization court would comply with the statutory directive of Section 17(a) of the MRRA, Congress provided in Sections 106 and 110 of RITA a compromise which it believed would assure prompt and certain protection for employees while litigation over the protections afforded by Section 17(a) of the MRRA was prosecuted. H. Rpt. No. 96-839, *supra*, at 22-23.

Congress concluded that its compromise in RITA was *essential* to our national interests (H.Rpt. No. 96-1041, *supra*, at 26), and it specifically stated in Section 102 of RITA (the Congressional Findings), 45 U.S.C. §1001, that:

> (1) [The] uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
>
> (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
>
> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economics of the States in which such railroad principally operates; and
>
> (4) premature cessation of services over lines which are the subject of pending purchase application [*sic*]

would result in harm to the shipping public and could imperil continuation of vital commuter service.

Congress obviously recognized that to be effective the benefits to be provided through Sections 106 and 110 could not be delayed, and it attempted to devise its statutory scheme so as to assure that payments to Rock Island employees would be "made forthwith, notwithstanding any ensuing litigation concerning such payments." H.Rpt. No. 96-1041, *supra*, at 26. As Congress then added: "The Conferees believe that legislation is *essential* to provide for an orderly transition." *Id.* (emphasis added).

The District Court, however, had a different view of the balance to be struck between the rights of the public and the rights of those seeking an expeditious liquidation of the Rock Island. When it authorized the abandonment of the CRI three (3) days after RITA was enacted, the CRI reorganization court opined that it did not have to protect employees as Section 17(a)(1) of the MRRA mandated. And when it addressed Sections 106 and 110 of RITA shortly thereafter, it stated that the interests of the public, including the need to protect employees, were now outweighed by the interests of the creditors and shareholders in liquidating the debtor. See, Appendix F at 25a. Those conclusions as to the subordinate position of the public interest in this case formed the basis for the court's decision to reject the plan which Congress had chosen to provide for an orderly transition of the CRI system.

Congress, however, disagreed with the reorganization court, and after reconsidering that legislation, it reaffirmed what it had concluded before, and again mandated that the Rock Island not leave its employees

destitute. As Congress stated in explaining its purpose for enacting the SRA amendments:

> By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

H.Rpt. No. 96-1430, *supra*, at 138. But once again the reorganization court disagreed with the balance which Congress had struck, for in its view Congress could not constitutionally expect the Rock Island to aid Rock Island employees. Appendix C at 10a.

This Court has previously emphasized that in cases under Section 77 of the Bankruptcy Act, when the "public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government . . ." *Ecker* v. *Western Pac, Ry.*, 318 U.S. 448, 468 (1943). Here, Congress has twice mandated a solution to a problem which it perceived to be crucial to the public interest, and twice now that solution has been totally frustrated.

While appellant RLEA recognizes that the Judicial Branch of our federal government is entrusted with the obligation to interpret the Constitution of this government, it is also well recognized that the courts should not declare an Act of Congress unconstitutional unless no other reasonable construction of the statute is possible. *E.g., Regional Rail Reorganization Act Cases* [hereinafter, "*Rail Act Cases*"], 419 U.S. 102 (1974). It is but a corollary of that doctrine which is founded in part upon the separation of powers that if the courts should declare an Act of Congress unconstitutional, the

courts should carefully detail the errors which are perceived in that legislation. In this case, no court has yet issued an opinion on the merits of this case in which the reasons for the decision holding Sections 106 and 110 of RITA unconstitutional are precisely set forth.

Appellant RLEA respectfully submits that the issues presented by this case are important, not only to the destitute Rock Island employees, but also to all rail employees, management and investors. The degree of the Rock Island's plight is unique today, but there are presently other railroads which may well be in a similar situation in the near future. In light of the specific and mandatory nature of the protections for employees now present in the Bankruptcy Code (11 U.S.C. §§1170(e)(1), 1172(c)(1)) and in the MRRA (45 U.S.C. §§904, 915), the constitutional issues raised in this case will surely surface again. And, as in this case, when those issues become justiciable they will demand an immediate and prompt answer from the courts, and possibly from Congress. Appellant RLEA respectfully submits that the issues presented herein are substantial and should be resolved at this time so that all interests are fully apprised of the status of the congressionally mandated obligation to consider and to protect the interests of railroad workers.

2. A second reason why this appeal presents substantial questions which warrant plenary review is that the court below took the grave step of declaring an Act of Congress unconstitutional without carefully or properly balancing the equities involved. An examination of the facts in this case shows that, because of the availability of a later Tucker Act remedy, the potential harm to appellees from a denial of their injunctive request is not irreparable as a matter of law, and that the court, therefore, abused its discretion in granting the injunction.

Justices of this Court have recognized that "statutes are presumptively constitutional and, absent compelling equities on the other side . . ., should remain in effect pending a final decision on the merits by this Court." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist J.; in chambers); *accord, Williams* v. *Zbaraz*, 442 U.S. 1309, 1312 (1979)(Stevens, J.; in chambers). In this case, appellant RLEA submits, appellees cannot show that there are compelling equities on their side to continue the injunction in effect, and due to the clear injury to the public and to the employees represented by appellant, the injunction should never have been issued.

When Mr. Justice Stevens denied appellant RLEA's request for a stay of the June 9th injunction, he did so on the assumption that it was not clear that the Tucker Act would be available to the appellees, and that since it appeared that the Act effected a simple taking of the property of the general creditors, a stay of the injunction "would set in motion a chain of events that would lead to substantial payments that are unconstitutional and unrecoverable. . . ." *RLEA* v. *Gibbons*, Appendix J at 47a. Once Section 124(c) of RITA was enacted as part of the SRA, however, that conclusion of irreparable harm was no longer tenable, for this Court has previously recognized that the Tucker Act provides an adequate remedy at law to correct a claim of an uncompensated taking. *E.g., Rail Act Cases, supra,* 419 U.S. at 126-27; *Hurley* v. *Kincaid,* 285 U.S. 95, 104-05 (1932); *accord, Coffman* v. *Breeze Corporations, Inc.,* 323 U.S. 316, 323 (1945). As this Court stated in *Hurley* v. *Kincaid, supra*, an analogous situation:

> For even if the defendants are acting illegally, under the Act, in threatening to proceed without first ac-

> quiring flowage rights over the complainant's lands, the illegality . . . is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The 5th Amendment does not entitle him to be paid in advance of the taking.

285 U.S. at 104 (footnote omitted). The injunction in that case was set aside because this Court concluded that "the complainant has a plain, adequate and complete remedy at law"—*i.e.*, the Tucker Act. *Id.* at 105. That holding, appellant RLEA submits, is applicable and should have been accepted by the lower courts as being controlling in this case.

Nevertheless, when the reorganization court examined Sections 106 and 110 of RITA after the SRA was passed, it concluded that the "implementation of this Act will constitute irreparable harm to the estate." Appendix B-1 at 6a. According to the reorganization court, the irreparable harm now lay in the "brooding omnipresence of a potential liability representing a significant percentage of the total assets." Appendix B-1 at 5a. Such an uncertainty, the court reasoned, would "totally halt the liquidation for the long period consumed by the appellate process," and would "distort" the whole liquidation plan. *Id.* Appellant RLEA respectfully submits that the conversion of those facts into irreparable harm (a necessary predicate for the preliminary injunction in this case frustrating the will of Congress) cannot stand close scrutiny, and indeed, is contrary to the prior decisions of this Court in the *Rail Act Cases* and in *Hurley* as to the import of the Tucker Act remedy.

Contrary to the District Court's assertion, the "brooding omnipresence" of the potential liability quantified by Section 106 has not been dispelled by the in-

junction; that potential liability remains and it will remain uncertain until a final resolution of this appeal. Moreover, the presence of this liability should not injure the Trustee's credit standing, for what the reorganization court ignored was the fact that Congress has provided a funding mechanism to supply the monies needed to implement Section 106 of RITA—*i.e.*, Section 110 of RITA. The Trustee need not expend one penny of estate funds until after this appeal is resolved and he repays the Government.

Balanced against those assertions of harm to the appellees if this injunction were not granted, were those facts showing the immediate need for financial aid to employees, and the fact that Congress has twice stated that a speedy implementation of its program to aid Rock Island employees was essential to vital national interests. These facts were ignored by the reorganization court, and an examination of its statements shows that it enjoined Sections 106 and 110 of RITA simply because it believed those provisions to be unconstitutional. That injunction, RLEA submits, was not based upon a balancing of the equities and a conclusion that the potential harm to the estate far outweighed the interests of the public and the employees, a conclusion which cannot be made in this case.

Appellant RLEA respectfully submits that this Court, because of the separation of powers doctrine, should accept review of this case, and should examine the manner in which the reorganization court, and thus the court of appeals in affirming the October 15th order, balanced the equities in this case. Appellant respectfully submits that an Act of Congress should not be declared unconstitutional and enjoined on such a flimsy showing of inconsequential harm to appellees as has been made in this case.

3. A third reason for granting plenary review of this appeal is that this case presents several substantive issues which are substantial and which need to be resolved at this time. To date, none of the courts which have passed on this case have addressed in detail the reasons which have led to the conclusion that Sections 106 and 110 of RITA, even as amended, effect an unconstitutional taking of property. However, in order to reach that conclusion in light of the SRA amendments to RITA, both the reorganization court and the court of appeals must have concluded that: (1) Section 106 of RITA effected a taking of property of the estate even though that section merely quantified and compromised a previously existing obligation (*e.g., United States* v. *Lowden,* 308 U.S. 225 (1939); 45 U.S.C. §915(a)(1); 49 U.S.C. §10903(b)(2)); (2) The Fifth Amendment to the Constitution of the United States authorized a Section 77 reorganization court to liquidate a financially distressed debtor (*compare, Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396 (1920), *with, Reconstruction Finance Corp.* v. *Denver & R.G.W.R.,* 328 U.S. 495, 535 (1946)); and (3) The illegal taking was uncompensated in spite of the availability of the Tucker Act as a means to acquire compensation. *E.g., Rail Act Cases, supra,* 419 U.S. at 126-27; *Hurley* v. *Kincaid, supra.* Appellant RLEA respectfully submits that by concluding that Sections 106 and 110 of RITA were unconstitutional as effecting an uncompensated taking of private property for public purposes, both the reorganization court and the court of appeals reached conclusions on each of the above issues which were contrary to prior decisions of this Court.

According to the reorganization court, Sections 106 and 110 of RITA, as amended, run afoul of the Constitution because those provisions place upon the Rock Island estate an obligation to provide protective benefits

to needy Rock Island employees. Appendix C at 10a. Having ordered the liquidation of the Rock Island, the reorganization court reasoned, the public interest no longer was a factor to be balanced against the interests of the creditors and the estate. Appendix E at 16a-17a. Consequently, Congress could no longer look to the Rock Island estate to serve the public interest by requiring that carrier to protect its employees at its expense. Appendix F at 26a-27a.

An immediate and glaring error of that reasoning is that the public interest is still an integral part of the Rock Island reorganization proceeding since the only jurisdiction which that court has over the Rock Island comes from Section 77 of the Bankruptcy Act, 11 U.S.C. §205. It is beyond question that the public interest is an essential ingredient of any action by a reorganization court pursuant to the jurisdiction conferred by Section 77. *New Haven Inclusion Cases,* 399 U.S. 392, 431 (1970). Even though the District Court believes it is liquidating the debtor, Section 77 does not give it that power, especially in the circumstances of this case where it has made no provision for continued rail services (*e.g., In re Lehigh Valley R.,* 558 F.2d 137 (3d Cir. 1977)), and consequently, it should be clear that the public interest remains a primary concern in the proceeding.

But even accepting, *arguendo*, the CRI court's erroneous premise for its ruling, it is also beyond question that Congress, in the exercise of its powers under the Commerce Clause (Art. 1, §8, cl. 3, U.S. Const.) has the absolute right to regulate the terms or requirements of entry and exit from interstate railroad operations. *E.g.* 49 U.S.C. §10901, 10903. One such requirement which has been well recognized since at least as long ago as the

enactment of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211 (1933), is that the interests of employees must be taken into consideration and protected. *E.g., United States* v. *Lowden, supra.* That requirement specifically applies to abandonments of operations by rail carrier, *e.g., ICC* v. *Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-78 (1942), and in 1976 that requirement was made mandatory by the Congress in Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, codified as 49 U.S.C. §10903(b)(2).[11] When Congress in Sections 5(a) and 17(a) of the MRRA, 45 U.S.C. §§904(a), 915(a), gave Section 77 reorganization courts the power to authorize abandonments, it did so with the specific admonition that:

> In authorizing any abandonments pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. §11347] . . . .

45 U.S.C. §915(a).

While the Rock Island reorganization court refused to impose provisions to protect employees when it authorized an abandonment of the CRI system,[12] it

---

[11] The Commission, relying upon language in a conference report to that legislation, has concluded that it still retains discretion in an entire line abandonment case to refuse to impose employee protections. *E.G., Wellsville, A. & G. R.—Abandonment*, 354 I.C.C. 744 (1978); *but see*, H.Rpt. No. 96-1430, *supra*, at 138-39; H.Rpt. No. 96-839, *supra*, at 63-66.

[12] The court concluded that Section 17(a), as well as its employee protection requirement, was not applicable to its ruling "confirming" the abandonment of the Rock Island, apparently because of constitutional reasons.

made that decision *after* Congress had mandated that employees be protected whenever a Section 77 reorganization court authorizes an abandonment. 45 U.S.C. §915(a)(1). When Congress amended RITA through the SRA, it explained as follows its reasoning in looking to the CRI estate to aid its employees:

> The conferees believe that there is an obligation upon the Rock Island estate to provide employee protection as a claim of administration to its employees who were not covered by the March 4, 1980, agreement. Further, the conferees believe the Rock Island estate has benefited from the Rock Island Transition Act by the reduction in its employee protection liability and through the congressionally-supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission. The conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

H. Rpt. 96-1430, *supra,* 138-39.

Consequently, it cannot validly be maintained that the imposition by Congress of a requirement that the Rock Island provide employee protection was either beyond Congress' powers or in violation of due process since Section 106 merely quantified a potentially larger debt of the estate, and provided a compromise for a troublesome question which has strong public interest considerations. *See,* H.Rpt. No. 96-839, *supra,* at 22-23; *accord, Ecker* v. *Western Pac. R.,* 318 U.S. 448, 468 (1943).

But even if the lower courts were correct that the imposition of the arrangement required by Section 106 of RITA, as amended, would be a taking for public purposes, that conclusion does not lead to the further conclusion that the taking is unconstitutional so as to render Section 106 enjoinable. This Court has previously observed that a statute can be saved from unconstitutionality by the Tucker Act, 28 U.S.C. §1491. *E.g. Rail Act Cases, supra,* 419 U.S. at 126-27. The availability of the Tucker Act for the creditors (45 U.S.C. §1018(c)) effectively eliminates any claim in this case that Section 106 can effect an unlawful taking of property in violation of the Fifth Amendment, for the essence of such a claim is that there is an uncompensated taking; the Tucker Act, especially when coupled with the funding provisions of Section 110 of RITA, provide a reasonable, certain and adequate provision for obtaining compensation. *E.g., Rail Act Cases, supra; Hurley* v. *Kincaid, supra.* Appellant RLEA respectfully submits that the courts below disregarded this Court's decisions on this point.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
(Counsel of Record)

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, NW
Washington, DC 20036
(202) 296-8500

Attorneys for Railway Labor Executives' Association

Date: January 21, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

(Argued *en banc* November 13, 1980)

December 16, 1980

Before HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge**

In the Matter of:

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,*

Nos. 80-2487 and 80-2536

Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75 B 2697

FRANK J. MCGARR, *Judge.*

Order

This is an appeal from an order entered by the district court October 15, 1980, continuing in effect a preliminary

---

* Circuit Judges Walter J. Cummings and Wilbur F. Pell, Jr. did not participate in the *en banc* hearing.

injunction issued June 9, 1980; the injunction bars the Interstate Commerce Commission, the United States Secretary of Transportation, and the Trustee of the Debtor from complying with the labor protection requirements of Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act.

We heard the matter *en banc* pursuant to the Staggers Rail Act. Those circuit judges in regular active service who deem themselves disqualified did not participate. We took with the case a motion to dismiss on the ground that the issue is pending before the Supreme Court, an appeal having been taken from the injunction of June 9, 1980 before enactment of the Staggers Rail Act.

We all agree that in view of the Staggers Rail Act the motion to dismiss the appeal should be DENIED, and IT IS SO ORDERED.

On the merits, Judges Fairchild, Sprecher, and Cudahy voted to reverse the order appealed from. Judges Swygert, Bauer, and Wood voted to affirm.

The Court being equally divided, the order appealed from is necessarily AFFIRMED.

IT IS SO ORDERED.

APPENDIX B-1

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Defendants.

No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock

Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Transportation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court. The re-enacted labor protection requirements

appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

DATED: October 15, 1980

APPENDIX B-2

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) P.1, lines 1 and 2 should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p.3, line 13 should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p.4, line 4 should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p.4, line 16 should read: "4) The court orders the continuance of the preliminary injunction:. . ."

APPENDIX C

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS OF OCTOBER 7, 1980

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with themselves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I

would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all un-

constitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL.,*Plaintiffs,*

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; AND NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a complaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this

day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminary enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

Partial Transcript Of Proceedings Of June 9, 1980

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated and hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not

their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which

operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated appellate procedure. The second, in-

cluding the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrustion [*sic*] of the Court into this implementation of this statutory program on constituional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constituional issues here. My reservatins, however, are as to the procedural anomalies which this statute emobidies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even

if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward,

that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN. Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel, I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

(WHICH WERE ALL OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THE DAY AND DATE AFORESAID.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS ON MOTION TO RECONSIDER PRELIMINARY INJUNCTION OF JUNE 9, 1980

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

[Pages 49-59]

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting that I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to

make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heard a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected [*sic*] by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of

operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone is this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the

public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward, and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing in unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confusion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen has given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutinality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief,

that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX G

JUDGEMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 16, 1980

Before HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge**

In the Matter of:

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,*

Nos. 80-2487 and 80-2536

Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75 B 2697

FRANK J. MCGARR, *Judge.*

This cause was heard on the record from the United States District Court for the Norhtern District of Illinois, Eastern Division, and was argued by counsel.

---

* Circuit Judges Walter J. Cummings and Wilbur F. Pell, Jr. did not participate in the *en banc* hearing.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this court entered this date.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 80-2487 and 80-2536

In the Matter of:

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Debtor.

Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION, THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and NEIL P. GOLDSCHMIDT, United States Secretary of Transportation. *Appellants.*

Notice of Appeal

PLEASE TAKE NOTICE that Appellant Railway Labor Executives' Association ("RLEA") hereby appeals to the Supreme Court of the United States the Judgment of this Court entered on December 17, 1980 [*sic*], affirming a preliminary injunction enjoining enforcement of §§106 amd 110 of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980, 45 U.S.C. §§1005 and 1008. This appeal is taken pursuant to 28 U.S.C. §1252 since the judgment of this Court holds an act of Congress unconstitutional in a proceeding to which the United States, one of its agencies and one of its officers are parties.

Respectfully submitted,

/s/ JOHN O'B. CLARKE, JR.
John O'B. Clarke, Jr.

Attorneys for Railway Labor Executives' Association

Date: December 19, 1980

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Notice of Appeal of the Railway Labor Executives' Association by mailing copies thereof with firstclass postage prepaid and properly addressed to the following:

HON. WADE H. MCGREE, JR.
Solicitor General of the United States
Room 5143
U.S. Department of Justice
10th & Constitution Avenue, NW
Washington, DC 20530

DANIEL R. MURRAY, ESQUIRE
JENNER & BLOCK
Suite 4400
One IBM Plaza
Chicago, IL 60611

MILTON L. FISHER, ESQUIRE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, IL 60604

RICHARD A. ALLEN, ESQUIRE
General Counsel
INTERSTATE COMMERCE COMMISSION
12th & Constitution Avenue, NW
Washington, DC 20423

JOHN H. BROADLEY, ESQUIRE
U.S. DEPARTMENT OF JUSTICE
Room 1162 Todd Building
550 11th Street, NW
Washington, DC 20530

NICHOLAS G. MANOS, ESQUIRE
332 South Michigan Avenue
Chicago, IL 60604

JOSEPH GALLO, ESQUIRE
Suite 325
1120 Connecticut Avenue, NW
Washington, DC 20036

TERRY F. MORITZ, ESQUIRE
RUDNICK & WOLFE
Suite 9200
30 North LaSalle Street
Chicago, IL 60602

Dated at Washington, DC, this 19th day of December, 1980.

/s/ JOHN O'B. CLARKE, JR.
John O'B. Clarke, Jr.

APPENDIX I

Constitutional Provisions And Statutes Relied Upon

1. *Fifth Amendment To The Constitution Of The United States*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. *Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, as originally enacted, and as amended by Pub. L. No. 96-448**

A. Sec. 106, 45 U.S.C. §1005	Sec. 106, as amended, 45 U.S.C. §1005
Employee Protection Agreements	Employee Protection Agreements
(a) No later than [10] days after the date of enactment of [this] Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the	(a) No later than *5* days after the date of enactment of the *Staggers Rail* Act *of 1980*, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organiza-

* Those portions of the original Act deleted when amended by Pub.L. No. 96-448 are marked by brackets; those portions of the amended Act added by Pub.L. No. 96-448 are marked by italics.

As originally enacted

employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within [10] days after the date of enactment of [this] Act, the [parties shall immediately submit the matter] to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than [30] days after the date of enactment

As amended

tions representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within *5* days after the date of enactment of *the Staggers Rail* Act *of 1980*, the *matter shall be immediately submitted* to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than *15* days after the date of

As originally enacted	As amended
of [this] Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection [afforded under] section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.	enactment of *the Staggers Rail* Act *of 1980*, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection *established by and pursuant to* section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.
(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.	(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.
(d)[(1)] An order of the Commission under subsection	(d) An order of the Commission under subsection

As originally enacted	As amended
(b) of this section [may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.]	(b) of this section *and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit.* Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.
[(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court.] Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. [No determination by the court of appeals under this subsection may be reviewed in any other court.]	
(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall	(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall

As originally enacted

be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such banefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act".

As amended

be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act".

As originally enacted	As amended
B. Sec. 110, 45 U.S.C. §1008	Sec. 110, as amended, 45 U.S.C. §1008
Obligation Guarantees	Obligation Guarantees
Sec. 110(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.	Sec. 110(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.
(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.	(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.
(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.	(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.
(d) The total liability of the Rock Island Railroad in connection with benefits and	(d) The total liability of the Rock Island Railroad in connection with benefits and

As originally enacted	As amended
allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.	allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.
(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.	(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability *to employees* in connection with any employee protection agreement or arrangement entered into under section 106 of this title.
(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.	(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

C. Section 124, as added by Pub.L. No. 96-448, 45 U.S.C. §1018 [no comparable provision in RITA, as originally enacted].

Judicial Review

Sec. 124. (a) Notwithstanding any other provision of law, any appeal from —

(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.),

shall be taken to the United States Court of Appeals for the Seventh Circuit.

(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-1135

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Applicant*,

v.

WILLIAM M. GIBBONS, *Trustee*; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *et al.*

On Application for Stay.

[June 28, 1980]

Mr. Justice Stevens, Circuit Justice.

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad (the Rock Island) pursuant to §77 of the Bankruptcy Act of 1938, 11 U.S.C. §205, have been pending before Judge McGarr in the United States District Court for the Northern District of Illinois for over five years. Because the Rock Island had been sustaining continuing substantial losses, on January 25, 1980 Judge McGarr ordered the Trustee to prepare and file a preliminary plan of liquidation. On May 27, 1980, the interstate Commerce Commission filed an advisory report with the District Court concluding "that abandonbment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Consistent with its own precedents, the Commission apparently did not recommend that any special labor protection condition be imposed on the Rock Island in connection with the abandonment. On June 2, 1980, after receiving briefs and hearing argument, Judge McGarr entered an order authorizing complete abandonment of all Rock Island

operations and expressly holding that "no labor protection arrangement may be imposed on the Rock Island estate."

Two days earlier, however, the President had signed Public Law 96-254 entitled the Rock Island Railroad Transition and Employee Assistance Act ("the Act"). Section 106(a) of the Act required the Trustee, within 10 days, to enter into an agreement with the collective-bargaining representatives of Rock Island employees and former employees to provide for labor protection payments to terminated employees. Section 106(b) authorized the Interstate Commerce Commission to impose a labor protection arrangement on the estate if the Trustee failed to reach agreement with the unions. Section 110 of the Act authorized the Trustee to borrow up to $75 million from the United States to provide the funds for payments pursuant to that arrangement. It further provides that such borrowing, as well as the employeee protection claims themselves, should be treated as an expense of administration. It is my understanding that, effectively, the employee protection payments and any concomitant obligations of repayment to the United States are thus given priority over the claims of the general creditors on the assets of the estate. The Act further provides that no court may stay the payment of any labor protection benefits. And finally, §110(e) provides: "Except in connection with obligations guaranteed under this Section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under §106 of this Title."[1]

---

[1] An explanation of the Act is found in the Senate Proceedings. See remarks of Senator Kassebaum of Kansas, 126 Cong. Rec. S2280-S2281 (Mar. 6, 1980). In substance, it appears that the Senator was particularly concerned with preserving the possibility of selling a portion of the Rock Island, known as the Tucumcari Line from Kansas City to New Mexico, to the Southern Pacific Railroad. She explained that the bill extended "directed service" of the Rock Island, which as I understand it, means service ordered by the Federal Government with any losses incurred underwritten by the

Within the 10-day period, the Trustee applied for a preliminary injunction against implementation of the labor protection arrangement provisions of the Act on the ground

---

Federal Government. She indicated that in February representatives of the Labor Unions and the acquiring railroads had worked out labor agreements adequate to protect employees who would be re-employed by the acquiring roads, but that there was a substantial risk that no protection would be made available to terminated employees who would not be re-employed, and that the smooth transfer might be interrupted by a broad strike called to obtain compensation for the employees who lost their jobs. It was in order to avoid this prospect that the bill was apparently designed to compel the estate to make adequate termination payments that it was not already obligated to make to those terminated employees. It also appears that the original plan was to fund $50 million for those employees, $30 million of which would be secured by the Government as a high priority administration expense, the other $20 million being subordinated to the claims of all other creditors. The total loan was changed to $75 million prior to passage, and, more significantly, all of which was to be given the high priority of an administration expense. Thus, Congress rather clearly indicated its intent that the Government ultimately not to be required to underwrite any of the employee protection payments, but rather to have them imposed entirely as a burden on the Rock Island estate.

See also the remarks of Congressman Madigan, 126 Cong. Rec. H2329 (Mar. 28, 1980), in support of H.R. 6837, which included two titles, the first containing provisions for the completion of the northeast corridor. Title II, which became the Rock Island Railroad Employee Assistance Act, seemed primarily intended to authorize so-called "directed service" to be funded by the Federal Government, but it also included the employee protection program. With respect to the latter, Congressman Madigan stated, in part:

"There is a $75 million guaranteed obligation in this bill for labor protection payments to the Rock Island employees whose jobs are terminated. That is not an appropriation of Federal funds that will not be returned; it is a priority claim against the estate of the Rock Island Railroad, and it is structured exactly the same as the Milwaukee bill which we passed late last year.

* * *

that the statute authorized an unconstitutional taking of the property of the estate. Judge McGarr granted that relief, concluding that (1) the procedural provisions of the Act required him to take action immediately in order to preserve the estate from irreparable damage, (2) there were no pre-existing contractual or statutory obligations to make labor protection payments that were being quantified by the Act, and (3) it would serve neither a public purpose nor the interest of the estate in view of the total abandonment of the Rock Island's operations that had been authorized. He also implicitly concluded that the statutory program could not be justified as necessary to facilitate sales by the Trustee of portions of the Railroad's operating properties.

On June 21, 1980, applicant Railway Labor Executives Association applied to me in my capacity as Circuit Justice for a stay of Judge McGarr's preliminary injunction.[2] Four days later, on June 25, 1980, the United States filed a memorandum supporting that stay application. The applicant contends that the estate will not suffer irreparable damage by simply permitting the negotiation of a labor protection plan to commence. It argues that even if payments pursuant to such a plan would result in an unconstitutional taking of the estate's property, the estate might still be able to convince Judge McGarr that the statutory prohibition against court orders prohibiting payments pursuant to such arrangement is unconstitutional, and that it would be better to enjoin such payments rather than the negotiation of the underlying plan.

"At the risk of being redundant, I would like to repeat, the $750 million for the Northeast corridor is in the President's budget. *The money for the Rock Island Railroad will be paid back from the estate of the Rock Island Railroad.*" (Emphasis added.)

It is worth noting that the "Milwaukee bill" concerned a genuine railroad reorganization, not a liquidation.

[2] Appeal lies to this Court under 28 U. S. C. §1252, since Judge McGarr held an Act of Congress unconstitutional.

Alternatively, it is argued that a remedy against the Government to make the estate whole may ultimately be available in the Court of Claims under the Tucker Act if it turns out that any payments made were unconstitutionally required.

Like Judge McGarr, I do not find persuasive any of the suggestions that the Act could not cause the estate irreparable harm. And while the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, see Memorandum for the United States, at 5-6, it is obvious that his suggestion is equivocal. Moreover, having read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

Accordingly, since there is a strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that are unconstitutional and unrecoverable, I believe that a sufficient showing of irreparable damage has been made to support the entry of the preliminary injunction. Necessarily, my views are tentative, based as they are on the relatively brief submissions of the parties. Nonetheless, for the forgoing reasons, I have decided to deny the application for a stay.

APPENDIX J

List of RLEA Member Organizations

American Railway Supervisors Association
American Trian Dispatchers Associaion
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Raiway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organizations of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Railway Employes Department, AFL-CIO
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

Office-Supreme Court, U.S.
FILED
FEB 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO CONSOLIDATE AND AFFIRM

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

RUDNICK & WOLFE
30 North LaSalle Street
Chicago, Illinois 60602
(312) 368-4000

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

NICHOLAS G. MANOS
Attorney for William M. Gibbons, Trustee of Chicago, Rock Island & Pacific Railroad Company

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
BARBARA S. STEINER
DEBORAH H. BORNSTEIN
RANDALL E. MEHRBERG
Attorneys for Henry Crown, et al.

TERRY F. MORITZ
MICHAEL C. KIM
Attorneys for The First National Bank of Chicago, as Indenture Trustee

MILTON L. FISHER
HAROLD L. KAPLAN
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

February 18, 1981

ISSUES PRESENTED FOR REVIEW

(1) Whether the Rock Island Act's employee protection scheme violates the fifth amendment to the United States Constitution through its uncompensated taking of the private property of the Rock Island estate for a purported public purpose and without due process of law.

(2) Whether the Rock Island Act's employee protection scheme violates the due process, separation of powers and uniformity in bankruptcy provisions of the United States Constitution by its summary taking of the property of the Rock Island estate.

(3) Whether the oblique reference to the Tucker Act added by the Staggers Act amendments cures the constitutional defects of the Rock Island Act.[1]

---

[1]Parent Companies, Subsidiaries and Affiliates of the appellees are listed in Appendix C, *infra*.

TABLE OF CONTENTS

	Page
ISSUES PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	2
STATEMENT OF FACTS	3
ARGUMENT	7
I. THE DISTRICT COURT WAS MANIFESTLY CORRECT IN FINDING THE LABOR PROTECTION SCHEME OF THE ROCK ISLAND ACT UNCONSTITUTIONAL	7
II. THE OBLIQUE REFERENCE TO THE TUCKER ACT DOES NOT RENDER CONSTITUTIONAL THE OTHERWISE UNCONSTITUTIONAL ROCK ISLAND ACT	11
CONCLUSION	17
APPENDICES	
A. Decision of Court of Appeals Affirming the District Court's Order of Liquidation (February 11, 1981)	a-1
B. Order No. 248 (June 2, 1980)	b-1
C. Parent Companies, Subsidiaries and Affiliates	c-1

TABLE OF AUTHORITIES

	Page
CASES	
Armstrong v. United States, 364 U.S. 40 (1960).	11
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920)	9–11
Hurley v. Kincaid, 285 U.S. 95 (1932).....	12
In re Chicago, Rock Island & Pacific Railroad Co., No. 80-1353 (7th Cir. Feb. 11, 1981)...	9, 10
In re Chicago, Rock Island & Pacific Railroad Co., Nos. 80-2487 and 80-2536 (7th Cir. Dec. 16, 1980).....	6
Railway Labor Executives' Ass'n v. Gibbons, 100 S.Ct. 2668, 3057 (1980)	3, 12
Regional Rail Reorganization Act Cases (*"3R Act Cases"*) 419 U.S. 102 (1974).....	12, 13
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 49 U.S.L.W. 4033 (U.S. 1980).....	11
ADMINISTRATIVE DECISIONS	
Chicago, Rock Island & Pacific Railroad Co.—Abandonment, I.C.C. Report, Docket No. AB-46 (Sub-No. 22) (May 27, 1980).....	9
CONSTITUTIONAL PROVISIONS	
U.S. Const., amend. V	*passim*

Page

STATUTES

Bankruptcy Act of 1938, 11 U.S.C. § 205 ..... 7, 10

Interstate Commerce Act, 49 U.S.C. § 11125(a)(1) 8

Judicial Code, 28 U.S.C. § 1252 ..... 3, 6

Railway Labor Act, 45 U.S.C. § 151, *et seq.* ... 8

Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*, Pub. L. No. 96-254, 94 Stat. 339 (1980) ..... *passim*

Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 13, 1980) ..... *passim*

Tucker Act, 28 U.S.C. § 1491 ..... *passim*

No. 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO CONSOLIDATE AND AFFIRM

William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island ("appellees"), pursuant to Rules 16 and 42 of the Rules of the Supreme Court of the United States, respectfully request that this Court note probable jurisdiction of this appeal, consolidate this appeal with the appeal pending in this Court in No. 80-415, and affirm the rulings of the reorganization court that are the subject of these appeals on the ground that the decisions below were so obviously correct as not to warrant further review.

PRELIMINARY STATEMENT

This appeal arises from the order entered by District Judge Frank J. McGarr on October 15, 1980, in which he refused to vacate his injunction of June 9, 1980. That injunction is the subject of the appeal in *Railway Labor Executives' Ass'n v. Gibbons*, No. 80-415, pending before this Court. By his June 9, 1980 order, Judge McGarr enjoined the implementation of the employee protection scheme of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.* ("Rock Island Act"), on the ground that it would work an unconstitutional taking of the Rock Island estate and violate its due process rights. Judge McGarr's refusal on October 15 to vacate his June 9 injunction was based upon his finding that the Staggers Rail Act amendments to the Rock Island Act, P.L. No. 96-448, § 701 (Oct. 14, 1980) ("Staggers Act"), merely reenacted, with only cosmetic changes, the unconstitutional scheme contained in the original Act.

Appellees respectfully urge this Court to consolidate this appeal with the appeal pending in No. 80-415 in order to cut through the procedural morass created by Congress' improvident legislation and RLEA's repeated appeals, to achieve judicial economy, and to avoid the risk of inconsistent adjudications. Both appeals filed by RLEA turn upon the same issue—whether Congress may impose upon a railroad in liquidation a new labor protection obligation. The basic issue on appeal in both cases is whether the labor protection scheme imposed by the Rock Island Act and reenacted by the Staggers Act is constitutional. The only new issue raised by this appeal is whether the oblique reference to the Tucker Act in the Staggers Act cures the Rock Island Act's constitutional deficiencies.

Appellees submit that Judge McGarr was entirely correct in his determination that the Rock Island Act's imposition of a new $75,000,000 labor protection obligation on the bankrupt Rock Island is unconstitutional. Appellees maintain that Judge McGarr was also correct in ruling that the oblique reference to the Tucker

Act in the Staggers Act amendments does not cure the unconstitutionality of the statutory scheme. Appellees therefore respectfully request this Court to note probable jurisdiction of this appeal, consolidate this appeal with the appeal in Case No. 80-415, and summarily affirm the decisions of the district court and the court of appeals that the basic Rock Island Act employee protection scheme, even as amended, is unconstitutional.

STATEMENT OF FACTS

This Court is no stranger to the facts of these proceedings.[2] On June 9, 1980, Judge McGarr enjoined the implementation of the employee protection provisions of the Rock Island Act, finding that the $75,000,000 obligation to fund a wholly new employee protection scheme worked an unconstitutional taking of the property of the Rock Island estate. RLEA filed a notice of appeal of this order to this Court on June 11, 1980, pursuant to 28 U.S.C. § 1252. On June 20, 1980, after further briefing and oral argument, Judge McGarr denied a motion to reconsider his injunction. The next day, RLEA filed its application for a stay of the injunction before Justice Stevens, as Circuit Justice for the Seventh Circuit. Justice Stevens denied the RLEA's motion. The full Court sustained his denial on June 28, 1980.[3] RLEA's appeal of the reorganization court's order is presently pending in this Court in Case No. 80-415.

[2]Because of the provisions affecting judicial review contained in the Staggers Act, and because of the successive appeals and applications for stay filed with this Court by RLEA, this Court has already received a number of filings concerning the underlying facts and the legal questions raised by the Rock Island Act and the Staggers Act. Appellees respectfully refer the Court to Appellee's Motion to Affirm, *RLEA v. Gibbons*, No. 80-415 (U.S., *motion filed* Dec. 17, 1980) (hereinafter, "Motion to Affirm"), for a more detailed discussion of the statutory scheme, the facts, and the legal issues presented by the Rock Island Act and the Staggers Act.

[3]*RLEA v. Gibbons*, 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980) (opinion denying stay application); 100 S. Ct. 3057 (July 2, 1980) (order denying stay application) (No. 80-415).

Congress was displeased with the judicial branch's protection of the Rock Island estate from an unconstitutional taking but was still unwilling to appropriate public funds to pay for labor protection. Therefore, on September 29, 1980, Congress passed amendments to the Rock Island Act as part of the Staggers Act. The amendments reenacted, without substantial alteration, the same scheme for the imposition of a new $75,000,000 labor protection obligation on the Rock Island estate which was contained in the original Act. *Compare* Section 701(b)(1) of the Staggers Act with Section 106 of the Rock Island Act.

While the Staggers Act corrected some procedural defects in the original Act,[4] Congress' only effort at curing the unconstitutionality of the actual taking was limited to the addition of Section 124(c) to the Rock Island Act. This section provides that "nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act".

Based upon the proposed Staggers Act amendments to the Rock Island Act, on October 7, 1980, RLEA requested Judge McGarr to vacate his earlier order declaring the Act unconstitutional. On October 15, 1980, after the Staggers Act had become law and after the submission of additional briefs and oral argument, Judge McGarr found that the amendments failed to cure the Act's constitutional infirmities or remedy the irreparable injury which would be suffered by the Rock Island estate were the Act to be implemented. Consequently, the court refused to vacate its earlier order. Judge McGarr ruled that the Act remained unconstitutional:

> This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the

[4]Section 106(d)(1) of the original Act, which precluded any Commission or judicial stay of an order imposing labor protection under the Act, and the last sentence of § 106(d)(2), which precluded review by this Court, were eliminated.

ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Order of October 15, 1980, at 3-4 (RLEA Jurisdictional Statement App. B-1 at 5a).

Although the appeal from Judge McGarr's June 9 injunction remained pending in this Court, Section 701(a)(1) of the Staggers Act also added a new provision on judicial review to the original Act. Section 124 mandated that an appeal from any decision of the reorganization court respecting the constitutionality of the amended Rock Island Act must be taken to the Court of Appeals for the Seventh Circuit (notwithstanding the pendency of appeals of the June 9 injunction in this Court), that the appeals must be heard *en banc*, and that the court of appeals must render its final decision within 60 days of the filing of the last appeal. Con-

sequently, RLEA appealed from Judge McGarr's denial of its motion to vacate the June 9 injunction to the court of appeals.[5] But the forum thought by Congress and RLEA to be most favorable, the Seventh Circuit, did not sustain the constitutionality of this unprecedented legislation and affirmed Judge McGarr's decision.[6]

On December 31, 1980, the court of appeals also denied RLEA's motion for an "emergency" stay of the district court's order.[7] Nearly one month later, RLEA filed another "emergency" application with Justice Stevens to stay the district court's order. That motion was also denied, whereupon RLEA applied to Justice Rehnquist for a stay. This third application for a stay now pends before this Court.

---

[5]In an effort to overcome this extraordinary Congressional circumvention of the usual appellate process prescribed by 28 U.S.C. § 1252, and in order to accelerate judicial review, appellees submitted to this Court a petition for certiorari before judgment by the court of appeals and a motion for expedited consideration thereof. *Gibbons v. RLEA*, No. 80-704 (U.S., *petition for cert. filed* Oct. 30, 1980). Despite RLEA's professed desire for a speedy final adjudication of the constitutionality of the Rock Island Act, RLEA did not support appellees' efforts for expedited review, presumably because RLEA did not wish to forego consideration of its appeal by the forum Congress had specially legislated on RLEA's behalf despite the pending appeal in this Court.

[6]*In re Chicago, R. I. & P. R. R.*, Nos. 80-2487 and 80-2536 (7th Cir. Dec. 16, 1980).

[7]*In re Chicago, R. I. & P. R. R.*, Nos. 80-2487 and 80-2536 (7th Cir. Dec. 31, 1980) (order denying motion for stay). In its application to Justice Rehnquist, RLEA represents that "on December 31, 1980, the court of appeals, *granted* RLEA's request to stay that preliminary injunction, contingent upon this Court's granting a stay of the original injunctive order of June 9, 1980." Application By Appellant Railway Labor Executives' Association for Stay of Preliminary Injunction Affirmed By an Equally Divided Court of Appeals, *RLEA v. Gibbons*, No. A-640 at 3 (U.S., *application filed* Jan. 28, 1981) (emphasis supplied). In truth, the court of appeals *denied* the stay application. Constrained by the *en banc* decision on the merits, affirming Judge McGarr's finding that the Rock Island Act as amended remained unconstitutional, and by this Court's denial on July 2, 1980 of RLEA's stay application, the court of appeals simply instructed the RLEA to look to this Court for the relief it seeks.

ARGUMENT

I.

THE DISTRICT COURT WAS MANIFESTLY CORRECT IN FINDING THE LABOR PROTECTION SCHEME OF THE ROCK ISLAND ACT UNCONSTITUTIONAL.

When Judge McGarr, who has presided over these proceedings since their inception, found that the Rock Island had fulfilled its public service obligations and that it thus had no further employee protection obligations, he had before him a destitute railroad that had served the public interest, in derogation of the interest of the creditors and shareholders, for five years.

The Rock Island filed for reorganization under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, on March 17, 1975, following a decade of devastating losses that totalled $103.4 million.[8] Judge McGarr, over the objections of the creditors and shareholders, caused his Trustee to continue rail operations during the ensuing four and one half years in an attempt to preserve rail service pursuant to the public interest objectives of Section 77. Massive operating losses resulted. In the period from January 1, 1975 through September 30, 1979, the Rock Island incurred losses in excess of $178.4 million.[9] By the summer of 1979, the Trustee's cash reserves had deteriorated to the point where the Trustee was unable to pay his operating expenses.[10] Thus, at a cost to the creditors and shareholders of over $175 million in operating losses, the jobs of Rock Island employees were preserved for a period of almost five years after the filing of the Section 77 petition.

---

[8]See Response of Intervenors Crown, et al. to Trustee's Report for 1978 and Four Months 1979 at 30 (Sept. 6, 1979), reprinted in Supplemental Appendix to Appellees' Motion To Affirm, filed Dec. 17, 1980 (hereinafter, "Supp. App. ____") at H-7.

[9]*Id.*, Income Statement-1979 (Supp. App. G-15).

[10]*Id.*, ICC Directed Service Order No. 1398, Appendix A, 44 F.R. 56,343 at 56,352-54 (1979).

Notwithstanding the financial disaster that had befallen the Rock Island, the Brotherhood of Railway and Airline Clerks and the United Transportation Union, represented in these proceedings by RLEA, struck the Rock Island on August 28, 1979.[11] On September 20, 1979, President Carter appointed an emergency board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, thereby mandating a return to work by the Rock Island employees.[12] Contrary to Judge McGarr's expectations,[13] and in defiance of President Carter's order, the Rock Island employees refused to return to work.

On September 26, 1979, the Interstate Commerce Commission ordered the Kansas City Terminal Railway Co. to operate and provide directed service over the lines of the Rock Island, based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible" and that the Rock Island "suffers from the type of 'cashlessness' described in 49 U.S.C. § 11125 (a) (1)."[14] Since that date, the Rock Island estate has had no railroad operations.

On January 21, 1980, Peat, Marwick, Mitchell & Co., the court's own expert, filed its report with the reorganization court. The report concluded that the Rock Island was not reorganizable as an ongoing railroad even if pared to its most profitable core. Report of Peat, Marwick, Mitchell & Co. (Jan. 21, 1980).

---

[11]The striking unions insisted upon payment of retroactive wage increases before agreeing upon even miminal work rules changes which the Trustee had sought in order to reduce costly waste and featherbedding. The retroactive wage increases in dispute would have cost the Rock Island estate $14 million—an amount of money the unions knew to be unavailable to the Trustee. The Trustee's position was that costly, inefficient work rules must be eliminated before he could pay wage increases. Report of Emergency Board No. 191 (Oct. 22, 1979) (Supp. App. C).

[12]*Id.*

[13]See Transcript of Proceedings, Sept. 21, 1979, at 9-11 (Supp. App. A-4-6).

[14]Directed Service Order No. 1398, *supra* note 3.

Based upon these circumstances, on January 25, 1980, Judge McGarr found that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . ." Transcript of Proceedings, Jan. 25, 1980, at 100. Judge McGarr thereupon ordered his Trustee to commence the liquidation of the Rock Island. *Id.* at 97.[15]

The court's finding that the Rock Island was not reorganizable as an ongoing railroad was subsequently confirmed by the Interstate Commerce Commission in a report to the reorganization court on May 27, 1980. The Commission concurred in the view that the Rock Island "has no realistic hope for reorganization or continued public service in its present form." *Chicago, Rock Island & Pacific Railroad Co.—Abandonment,* Interstate Commerce Commission Report, Docket No. AB-46 (Sub-No. 22) (May 27, 1980) at 4 (Supp. App. I-4).

On June 2, 1980, Judge McGarr confirmed the total abandonment of all Rock Island lines and discontinuance of service. Citing *Brooks-Scanlon Co. v. Railroad Commission,* 251 U.S. 396 (1920), and its progeny, Judge McGarr found that the Rock Island's abandonment of its entire railroad system was constitutionally mandated and that to force the Rock Island to continue operations indefinitely at a loss would constitute a violation of the fifth amendment rights of the creditors and shareholders. Consistent with the ICC's own precedent, the equities of the Rock Island situation, and because the Rock Island was constitutionally entitled to withdraw from rail operations, Judge McGarr also found that no labor protection obligations could be imposed in connection with the Rock Island's total line abandonment. Order No. 248 (June 2, 1980) (App. B, *infra*, at b-1).

---

[15]Judge McGarr's liquidation order of January 25, 1980, was affirmed by the United States Court of Appeals for the Seventh Circuit on February 11, 1981. The court's opinion is reprinted in Appendix A, *infra. In re Chicago, R. I. & P. R. R.*, No. 80-1353 (7th Cir. Feb. 11, 1981).

In essence, the reorganization court decided that having sustained immense losses in the service of the public during five years of attempted reorganization under Section 77, the Rock Island could no longer be compelled to devote its own resources to further the public interest.[16] As is fully set forth in the Motion to Affirm at 10-16, the limited period during which Rock Island's creditors and shareholders can be assumed to have agreed to commit the estate's resources to the public's transportation needs has long passed, and can be extended no further, consistent with the fifth amendment. Because the Rock Island estate can no longer be required to continue to devote its resources to advance national transportation policy, *a fortiori,* it cannot be required to further a component of that policy through new employee protection obligations.

RLEA repeatedly alludes to the unfortunate plight of the former employees of the Rock Island who have lost their means of livelihood as a result of the railroad's liquidation. *See, e.g.,* RLEA Jurisdictional Statement at 8. RLEA ignores the fact that the creditors and shareholders of the Rock Island have already sustained immense losses while the jobs of the Rock Island's employees were preserved for five years following the filing of the reorganization petition. RLEA also fails to mention the role that its own members played in the demise of the Rock Island, when its two largest unions struck the Rock Island at its most desperate hour. Finally, RLEA ignores the fact that, to the extent the Rock Island Act's labor protection program is necessary to further national transportation policies, the fifth amendment, *Brooks-*

[16]The Seventh Circuit Court of Appeals, in rejecting the argument of the RLEA that the Rock Island should not be permitted to liquidate, observed:

> "... the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest."

In re Chicago, R. I. & P. R. R., No. 80-1353, slip op. at 12 (App. A, *infra,* at a-15).

Scanlon and its progeny require that the government, and not the bankrupt Rock Island estate, pay the cost of the public benefit.[17]

In addition, the Rock Island Act plainly violates the constitutional principles of due process, separation of powers, and equal protection. As is more fully set forth in the Motion to Affirm, at 17-21, the Rock Island Act is replete with constitutional defects. First, the Rock Island Act violates the separation of powers doctrine by directing the reorganization court to impose without judicial review any labor protection arrangement ordered by the Commission. Second, the Rock Island Act violates the due process and separation of powers principles by its extraordinary curtailment of appellate review, including its attempt to mandate *en banc* review by the Seventh Circuit within a 60 day period. Third, the Act unconstitutionally singles out the Rock Island, thus offending the due process and equal protection clauses of the fifth amendment and resulting in special punitive legislation which the constitutional prohibition against bills of attainder was designed to prevent. Finally, the Rock Island Act violates the constitutional requirement that bankruptcy laws be uniform.

For all of these reasons, the reorganization court was manifestly correct in its finding that the Rock Island Act, even as amended by the Staggers Act, is unconstitutional.

II.

THE OBLIQUE REFERENCE TO THE TUCKER ACT DOES NOT RENDER CONSTITUTIONAL THE OTHERWISE UNCONSTITUTIONAL ROCK ISLAND ACT.

RLEA's motion to vacate Judge McGarr's June 9 injunction and its appeal of his refusal to do so are premised on the Staggers

[17]As this Court stated in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 49 U.S.L.W. 4033, 4035 (U.S. 1980), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960):

> "[t]he Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Act's addition of Section 124(c) to the Rock Island Act. That Section provides that:

> Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the "Tucker Act").

As is set forth in detail in the Motion to Affirm, at 21-27, the addition of this oblique reference to the Tucker Act does not cure the many constitutional defects that otherwise exist in the Rock Island Act.

The reference to the Tucker Act in Section 124(a) does not provide any certainty that the government will fund the labor protection scheme. Indeed, the bare mention of the Tucker Act without more is as vague as the suggestions concerning the availability of a Tucker Act remedy that were advanced in support of the original Act, suggestions which Justice Stevens found to be "equivocal" at best. *RLEA v. Gibbons, supra,* 100 S.Ct. at 2671. To pass constitutional muster, this Court has heretofore required "reasonable, certain and adequate" provisions for compensation at the time of the taking. *Regional Rail Reorganization Act Cases* (*"3R Act Cases"*), 419 U.S. 102, 156 (1974). Although many unequivocal alternatives were available to Congress to meet this requirement, the loose and noncommittal language of Section 124(a) simply does not rise to that level.

Both cases relied upon by RLEA in its Jurisdictional Statement at 22-24 to circumvent this conclusion are inapposite. *Hurley v. Kincaid,* 285 U.S. 95 (1932), involved specific real property which the government required to build a vitally needed floodway. Unquestionably, the government would have to compensate the owner for any flooding of his property. The only question deferred for later determination was the amount of compensation.

Similarly, in the *3R Act Cases*, the government had an emergent need for the rail lines of the Penn Central because those lines were essential to the economy of the Northeast. The Government conceded at the outset that a taking had occurred and that some compensation must be paid. Congress therefore appropriated $1.5 billion in cash and securities as compensation prior to the transfer, which amount could be adjusted in the subsequent Tucker Act proceeding. *3R Act Cases*, 419 U.S. at 128. Thus, the existence of a taking and the requirement of some governmental compensation of the Penn Central estate was not at issue in the *3R Act Cases*.

By contrast, here the government has not conceded that any taking has occurred or that the Rock Island estate has a right to any compensation. Moreover, here the government has no emergent need for specific property of the Rock Island. Unlike unique rail properties that are essential to a regional economy or land that must be used for a floodway, here $75,000,000 in cash, a completely fungible commodity, is to be taken by the government. It would be absurd to contend that the government has a pressing need for the cash of a bankrupt railroad in liquidation. The government may not use the Tucker Act to justify the seizure of $75,000,000 in totally fungible cash on the promise of "pay now—litigate later," any more than the government could justify the attachment of an individual citizen's bank account with the mere statement that he is not precluded from the opportunity to file a Tucker Act proceeding in the court of claims at a later date. Accordingly, the cases relied upon by RLEA to suggest that a possible later Tucker Act "remedy" cures an unconstitutional taking do not support that conclusion.

RLEA attempts to minimize Judge McGarr's finding that the "brooding omnipresence of a potential liability representing a significant percentage" of the Rock Island's total assets would seriously disrupt the liquidation of the estate. Order of October

15, 1980, at 3-4 (RLEA Jurisdictional Statement App. B-1 at 5a). RLEA argues that the potential liability will remain uncertain in any event until a final resolution of this appeal. See Jurisdictional Statement at 23-24.

However, the reorganization court's findings are rooted in and clearly supported by the troubled history of the Rock Island, with which Judge McGarr is intimately familiar. Within the last six years, the Rock Island has twice failed to meet its obligations to its trade creditors.[18] In light of these two prior defaults in payments to trade creditors, and in light of existing expenses of administration that may exceed $195,000,000,[19] the imposition of a $75,000,000 expense of administration on this estate creates a serious risk that trade creditors henceforth will be unwilling to deal with the Trustee on any basis other than cash in advance.

If the cost of administration claimants were to insist upon the impoundment of all or most of the proceeds arising from the sale of Rock Island assets, as some have already requested,[20] the Trustee's ability to obtain funds with which to pay the expenses of liquidation could be fatally impaired. Absent these funds, the orderly liquidation now under way could quickly become a shambles, at great loss to the creditors and shareholders of the Rock Island estate.[21]

---

[18]For a complete recitation of these prior defaults, see Memorandum of the Trustee, Creditors and Shareholders In Opposition To the Appellant RLEA's Application For a Stay of the Preliminary Injunction Issued By the District Court and Affirmed By the Court of Appeals for the Seventh Circuit, *RLEA v. Gibbons,* No. 80-1239 at 15-17 (U.S., *memorandum filed* Jan. 27, 1981) (hereinafter, "Appellees' Memorandum in Opposition to Stay").

[19]See Proposed Plan of Reorganization for Chicago, Rock Island & Pacific Railroad Company, filed on Dec. 28, 1979 at 19.

[20]For more detailed information, see Appellees' Memorandum in Opposition to Stay at 16-19.

[21]See Objection of United States Leasing International, Inc., to Trustee's Petition for Order Authorizing and Approving Sale and Other

(*Footnote continued on following page*)

RLEA argues that the cash position of the Trustee will not be harmed and, consequently, the orderly liquidation will not be impaired because "Congress has provided a funding mechanism to supply the monies needed to implement Section 106" so that the Trustee "need not expend one penny of estate funds until after this appeal is resolved and he repays the Government." Jurisdictional Statement at 24. RLEA assumes that the Trustee will be able to borrow the necessary $75,000,000 from the government, pursuant to Section 110 of the Rock Island Act. There is, however, absolutely no assurance that the Trustee will be able to obtain a government loan.

Section 110 provides that labor protection payments be funded from a government loan *or* from the assets of the Rock Island estate. The government is not obliged to lend the Rock Island money. A new President and a new Congress now have taken office, who are not subject to election year exigencies and face an economic and budgetary crisis that mandates paring federal expenditures in every possible way. RLEA has no basis for assuming that the new administration will be disposed to loan $75,000,000 to the Rock Island. Indeed, the new administration is likely to look with disfavor on the fiscal sleight of hand proposed by RLEA—that the money be paid out now subject to a later court of claims determination as to whether the government must assume the cost. RLEA undoubtedly favors this back-door method of financing (through use of the Tucker Act) because it knows that the new Congress and the new President are unlikely to make a straightforward Treasury appropriation of $75,000,000 for this purpose.

Regardless of whether the labor protection scheme is funded from the assets of the Rock Island or by a government loan

---

(*Footnote continued from previous page*)
Transactions Relating to Locomotives, Inventory, and Silvis, Illinois, Properties at 8, Dec. 18, 1980 (Supplemental Appendix of Trustee, Creditors and Shareholders, filed Jan. 27, 1981, at E-8).

occupying expense of administration status, the result will be to disrupt a speedy and orderly liquidation. Significantly, RLEA conceded in its Stay Application to Justice Stevens that "until the validity of Section 106 is resolved, there cannot be any meaningful plan to distribute the estate's assets." Application by Appellant Railway Labor Executives' Association for Stay of Preliminary Injunction, *Railway Labor Executives' Ass'n v. Gibbons*, No. A-640 (*application filed* Jan. 22, 1981) at 10. To relegate the estate to a later proceeding in the court of claims, with no assurance of ultimate payment, would be to subject the estate and its creditors to a severe disruption in the liquidation proceedings, delaying for years the formulation and implementation of a meaningful plan of reorganization. Judge McGarr was, therefore, manifestly correct in finding that the question of the Rock Island Act's constitutionality is ripe for determination now and should not be deferred to a subsequent court of claims proceeding. The Trustee, creditors and shareholders respectfully submit that the only way to prevent further disruption to the estate and the harm to its creditors and shareholders is now to affirm Judge McGarr's finding that the Rock Island Act is unconstitutional.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Motion to Affirm, appellees respectfully request that this Court note probable jurisdiction of this appeal, consolidate it with Case No. 80-415, and affirm the reorganization court's orders of June 9, 1980 and October 15, 1980.

Respectfully submitted,

Of Counsel:

By_____
Nicholas G. Manos
Attorney for William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

By_____
Albert E. Jenner, Jr.
Daniel R. Murray
Barbara S. Steiner
Deborah H. Bornstein
Randall E. Mehrberg
Attorneys for Henry Crown et al.

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

By_____
Terry F. Moritz
Michael C. Kim
Attorneys for The First National Bank of Chicago, as Indenture Trustee

RUDNICK & WOLFE
30 North LaSalle Street
Chicago, Illinois 60602
(312) 368-4000

By_____
Milton L. Fisher
Harold L. Kaplan
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

February 18, 1981

APPENDIX A

DECISION OF COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S ORDER OF LIQUIDATION

FEBRUARY 11, 1981

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 11, 1981

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY
Debtor.

No. 80-1353

APPEAL OF:

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 B 2697
Frank J. McGarr, *Judge.*

*Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

ORDER

This case presents one aspect of the continuing saga of the decline of the Chicago, Rock Island and Pacific Railroad Company ("Rock Island"). There are two questions before us in this appeal:

> (1) Did the district court, sitting as a railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, have the discretion to determine that the Trustee's plan of reorganization was unworkable and to refuse to transmit that plan to the Interstate Commerce Commission ("ICC")?
>
> (2) Did the district court, sitting as a railroad reorganization court, have the authority to order the Trustee to commence liquidation of the railroad?

The Railway Labor Executives' Association ("RLEA") argues that we should reverse the district court's order directing the Trustee to liquidate the Rock Island estate and that we should order the district court to transmit to the ICC the plan of reorganization filed by the Trustee on December 28, 1979. The Trustee of the Rock Island, William M. Gibbons, and various creditors of the Rock Island ("Creditors")[1] ask us to dismiss this appeal as moot or to affirm the actions of the district court.

I

On March 17, 1975, the Rock Island filed a petition for reorganization in the United States District Court for the Northern District of Illinois under Section 77 of the Bankruptcy Act, 11

---

[1]The parties referred to collectively as "Creditors" are as follows: First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as indenture trustees, and Henry Crown, et al., holders of first mortgage bonds, income debentures and common stock of the Rock Island.

The Trustee joined in the Creditors' Brief solely on the ground that the liquidation is not reversible and is so far advanced that any delay would be physically and economically impossible.

U.S.C. §205.[2] Judge McGarr was assigned to act as the reorganization court. On March 28, 1975, William M. Gibbons was appointed Trustee of the Rock Island and was instructed to manage and operate the debtor's railroad system.

Section 77(d) provides that "[t]he debtor, after a petition is filed . . ., shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed. . . ." 11 U.S.C. §205(d). The reorganization court several times extended the deadline for the Trustee to file a plan of reorganization. The Trustee filed his Plan of Reorganization ("Plan") on December 28, 1979.[3] An informational copy was furnished to the ICC in accordance with Bankruptcy Rule 8-301(c).

On January 8, 1980, the court entered Order No. 221. In that order the court found: it had jurisdiction pursuant to Bankruptcy

[2]The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), enacted November 6, 1978, codified and changed the prior Bankruptcy Act, including former Section 77. Section 403(a) of the Bankruptcy Reform Act, 92 Stat. 2683, however, provides that pending reorganizations, such as the one at bar, were to be governed by the previous law except for a few exceptions set forth in Section 403(b).

[3]Throughout the five years of reorganization prior to the filing of the Plan, the Rock Island suffered significant financial losses. The ICC found the Rock Island to be cashless on September 26, 1979, and ordered the Kansas City Terminal Railway Company ("KCT") to provide directed service over the Rock Island routes. *Directed Service Order No. 1398, Kansas City Terminal Ry.—Directed to Operate Over—Chicago, R. I. & P.*, 360 I.C.C. 289 (1979). This directed service was in effect at the time of the order appealed in the case at bar.

KCT's directed service ended on March 23, 1980. Following KCT's directed service operations, other rail carriers provided rail service over the Rock Island's lines through May 31, 1980, pursuant to ICC directed service orders. On May 30, 1980, the President signed the Rock Island Railroad Transition and Employee Assistance Act (the "Rock Island Act"), P.L. 96-254, 94 Stat. 339 (1980). The Rock Island Act provides for the continuation of directed service pending sales of the Rock Island's freight lines to other interested rail carriers and its Chicago-Joliet commuter line to the Regional Transportation Authority.

Rule 8-303[4] to retain the Plan for not less than thirty days; during that time the court would review the plan in the context of a study by Peat, Marwick & Mitchell, a court appointed independent consultant, and would consider modifications, alternative plans, and comments; the informational copy of the plan filed with the ICC did not constitute an official filing with the ICC; and the court would "formally transmit the Plan of Reorganization, modifications to it, and alternative plans, in accordance with Bankruptcy Rule 8-303, with whatever comments it may have, to the Commission for their action, pursuant to Bankruptcy Rule 8-303, with instructions to the Commission that the Commission should consider the Plan at that time."

On January 21, 1980, Peat, Marwick, Mitchell & Co. filed its report, in which it concluded that the core operation proposed by the Trustee in the Plan was not viable. At a status hearing on January 25, 1980, the Creditors and the Federal Railroad Administration argued that since the independent consultant had concluded that the Trustee's Plan was not feasible, the court should direct the Trustee to withdraw the Plan and to file a new plan which would provide for the total liquidation of the estate. The Creditors argued that the court would simply be wasting everyone's time in transmitting the Plan, or any reorganization plan, to the ICC. At that time, the Trustee argued that the Plan should be forwarded to the ICC for evaluation of the reorganizability of the core.

After listening to the arguments of counsel who were present at that status conference,[5] the court concluded that the consultant's

[4]Bankruptcy Rule 8-303 provides:

> Not less than 30 days after the first filing of a plan under Rule 8-301, the court shall transmit all plans and modifications which have been filed with it to the Interstate Commerce Commission for filing with and consideration by the Commission.

[5]The ICC did not appear at the hearing of January 25, 1980, although the ICC had been active in the proceedings to that date. At the January 25 hearing, John Broadley of the United States Department of Justice, representing the Federal Railroad Administration, stated:

(Footnote continued on following page)

report "is a good study and I am compelled to accept its conclusions." Tr. 97. The court continued:

> This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.
>
> The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation. . . .

Tr. at 97. The court's minute order of January 25, 1980 granted the Creditors' motion that the court decline to forward the Plan to the ICC and directed the Trustee to begin preparation of a plan of liquidation.

On February 19, 1980, the RLEA filed comments on the court's January 25 order. The court ordered that it would treat the comments as a motion for reconsideration. On February 27, 1980, the court denied the RLEA's motion to reconsider. The RLEA appeals from both the order of January 25, 1980 and the denial of reconsideration.

(Footnote continued from previous page)

> In connection with preparing a proposed order I had a discussion with Mr. Rush yesterday about the position the Commission would likely take if your Honor entered an order directing the Trustee to withdraw this plan. Mr. Rush indicated that if your Honor entered such an order the Commission, in all likelihood, would not find it expedient, necessary or proper to appeal that decision on jurisdictional grounds. And the Commission has frequently expressed concern about the exercise of its primary jurisdiction. Mr. Rush's indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision.

Tr. at 56-57. Mr. Broadley joined the creditors in seeking to have the plan of reorganization withdrawn.

Before proceeding to the legal arguments, we briefly recount the history of the Rock Island since February, 1980. On March 19, 1980, the court entered Order No. 229, which required the Trustee to file a plan of reorganization by July 17, 1980, encompassing the liquidation of the assets of the debtor. On April 14, 1980, the court entered Order No. 232, which directed the Trustee to file an application with the ICC "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operation thereof."[6]

The ICC filed its report in response to the Trustee's application for system-wide abandonment on May 23, 1980. Docket No. AB-46 (Sub.-No. 22). The ICC concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Docket No. AB-46 (Sub.-No. 22) at 3. The ICC denied the RLEA's motion to reject the abandonment application. *Id.* at 5-6.

On June 2, 1980, the reorganization court held hearings concerning the proposed abandonment and ordered total system-wide abandonment of the Rock Island's lines and discontinuance of its service.

The Trustee already has taken various steps toward liquidating the Rock Island. On June 16, 1980, the RLEA moved for a stay of liquidation, detailing the progress of the liquidation as follows:

> Rolling stock leases have been assigned or terminated while other operating equipment has been sold. On May 5, 1980, the District Court entered Order No. 234 granting the Trustee blanket authority to liquidate real and personal assets

[6]Section 17(a) of the Milwaukee Road Restructuring Act ("MRRA"), Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred ultimate jurisdiction over abandonments from the ICC to the reorganization court for cases pending under Section 77 of the Bankruptcy Act. Section 17(a) of the MRRA provides that the court may authorize abandonments pursuant to 11 U.S.C. §1170.

> and accounts under $100,000.00 in value. Real property, such as track rights of ways, has been sold. *See,* Docket Sheet Page 194-95. Also, an independent consultant has been retained by the estate to expeditiously liquidate the real property of the estate. Order dated May 28, 1980.

RLEA Motion to Stay at 5. On November 21, 1980, this court ordered that the RLEA's motion to stay further acts of liquidation pending appeal would be taken with the case at the time of its disposition.

On December 20, 1980 the RLEA filed with this court its "Emergency Renewal of Motion by Railway Labor Executives' Association to Stay All Further Acts of Liquidation Pending Appeal." The "Renewed Motion" was prompted by the Trustee's announcement of his intention to sell the Silvis, Illinois, facility and 214 locomotives to the Varlen Corporation. The RLEA argued that:

> [t]his single sale will surely decrease the already slim chances for reorganizing the Rock Island, for any resumption of rail operations over the core structure would encounter severe difficulties in resuming operations without sufficient engines and a major repair facility.

RLEA Renewed Motion at 4.

On December 24, 1980 we entered the following order:

> IT IS ORDERED that the renewed motion is DENIED to the extent that it seeks a stay of the sale of the properties mentioned in the intervenor-appellant's renewed motion. Intervenor-appellant has failed to satisfy all of the requirements for a grant of stay pending appeal. We cannot conclude at this point in our deliberations that the intervenor-appellant shall prevail on the merits of this appeal.
>
> The intervenor-appellant's motion of June 16, 1980, seeking a general stay pending appeal in this case, shall be resolved at a later date by the merits panel.

We now reach the merits and conclude that the district court acted within its authority in refusing to transmit the Trustee's plan of reorganization to the ICC and in ordering the Trustee to commence liquidation of the Rock Island.

II

Section 77(d) of the Bankruptcy Act, 11 U.S.C. § 205(d), deals with the filing of a plan of reorganization in a railroad reorganization. The RLEA argues that the ICC is to play the major role in reorganizing a debtor under Section 77, and that Bankruptcy Rule 8-303 cannot enlarge the jurisdiction of the court to examine the merits of a plan prior to transmittal to the ICC pursuant to Rule 8-303.

First, the RLEA argues that the ICC has the primary responsibility for formulating a reorganization plan and that, therefore, the reorganization court should not have rejected the Plan before the ICC had a chance to consider it. The RLEA finds support for its argument in *Ecker v. Western Pac. RR. Corp.*, 318 U.S. 448 (1943), where the Supreme Court stated:

> When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a decree of participation by the court.

318 U.S. at 468. But, while recognizing the importance of the expertise of the ICC, the Supreme Court also recognized the power of the reorganization court to find that a debtor is unreorganizable. The Supreme Court acknowledged that the reorganization court can veto a reorganization plan in its entirety after certification of the plan by the ICC. 318 U.S. at 474. *See* Section 77(e), 11 U.S.C. § 205(e).

The RLEA's reliance on *Ecker* to establish that the reorganization court should defer to ICC findings is misplaced. In *Ecker*, the Court affirmed the district court's approval, pursuant to Section

77(e), of a plan of reorganization certified by the ICC. The Court reversed the Ninth Circuit's finding that the district court should have exercised its independent judgment with respect to subjects such as valuation. A reorganization court's acceptance of ICC findings in proceedings pursuant to Section 77(e) simply is not relevant to the question of whether the reorganization court can order the Trustee to withdraw a proposed plan *before* submission to the ICC. *Ecker* dealt with the reorganization court's scope of review of a plan *after* certification by the ICC, not with a proposed plan submitted to the court by the Trustee.

Furthermore, in the more recent *New Haven Inclusion Cases*, 399 U.S. 392, 431-34 (1970), the Supreme Court emphasized the important, indeed dominant, role of the reorganization court in Section 77 proceedings. In that case, as in *Ecker*, the issue was the reorganization court's scope of review of ICC findings pursuant to Section 77(e). The Court stated:

> The statutory authority to appoint special masters and hold evidentiary hearings reflects the unique powers possessed by the reorganization court in passing upon the Commission's proposed plan of reorganization.
>
> . . .
>
> In the reorganization court reposes ultimate responsibility for determining that the plan presented to it by the Commission satisfies the "fair and equitable" requirement of § 77.

399 U.S. at 434. Without deciding to what degree *New Haven Inclusion Cases* erodes *Ecker*'s deference to ICC expertise in Section 77(e) proceedings,[7] we find that the balance of power between the reorganization court and the ICC in Section 77(d) proceedings does not require the reorganization court to seek ICC consideration of a proposed reorganization plan when the court has found that the plan has no chance of success.

[7] In his dissent, Justice Black complained of the majority's departure from *Ecker*. 399 U.S. at 499.

Next, the RLEA argues that the structure of Section 77(d) and Rule 8-303 show that the court's role with respect to the Trustee's plan is purely ministerial. The RLEA claims that the purpose of allowing the court to retain a plan for *not less than* 30 days is only for the sake of achieving efficiency by assuring that "all proponents of plans have filed their plans prior to transmission of the first filed plan to the Commission." Rule 8-303, Advisory Committee Note. We disagree. The ordinary outcome under Rule 8-303 will be that the court will transmit a plan to the ICC. But we cannot say that the court has no discretion whatsoever to aid in the efficient management contemplated by Rule 8-303 by refusing to transmit a manifestly unfeasible plan to the ICC.

Shortly after the Trustee's Plan was submitted, but before it was evaluated in light of the Peat, Marwick study, the reorganization court reflected on the purposes of Rule 8-303:

> Those purposes are obviously a preliminary review by the Court, of the proposal of alternative plans, and in the particular instances of this case an opportunity for the Court and the creditors and the Railroad, and the Government, to view this plan in the context of the Peat, Marwick evaluation of it. And under any ordinary circumstance that would not only be the ordinary course of the case but the wise course of the case. I think the thirty days is therefore a purpose. I recognize that the Court had very little discretion in this matter in terms of what it might do with the plan. It is conceivable to me, although I doubt that it will be applicable in this case, that the plan presented be one either by reading on its face or in the light of the Peat, Marwick evaluation, be one so completely without merit that the Court will not forward it to the Commission and order the preparation of another one, something more sensible.

Tr. of January 2, 1980 at 31-32. The court recognized that its discretion not to submit the plan to the ICC was limited to a situation that the court doubted would occur—that the plan was without merit in light of the Peat, Marwick study. But that situation

did occur, and the court properly exercised its discretion not to transmit the plan.

The court's action did not circumvent ICC involvement in either the reorganization or liquidation process. The court did not simply withhold the Plan from the ICC and commence reorganization without ICC input. Rather, the court ordered the Trustee to prepare a new plan aimed at liquidation. In fact, the court stated that the January 25, 1980 decision not to transmit the plan to the ICC "starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service . . . ." Tr. of January 25, 1980 at 98.

The ICC has not challenged the reorganization court's actions. At the hearing before the January 25 ruling, the government representative present informed the court that "[ICC counsel's] indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision." Tr. of January 25, 1980 at 56-57. In addition, the ICC's May 23, 1980 report recommending abandonment supports the court's view. The ICC states that

> [w]e have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated.

Docket No. AB-46 (Sub.-No. 22) at 3-4.

In light of the ICC's deference to the reorganization court's view of the Trustee's plan, as well as that court's great familiarity with the Rock Island through five years of reorganization proceedings, it is inaccurate for the RLEA to argue that the court

simply "substituted its judgment for that of the Commission." Reply Br. at 7. The court's decision must be viewed in the context of the entire history of the Rock Island. Judge McGarr stated in his January 25, 1980, ruling:

> I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundance of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

Tr. of January 25, 1980 at 95. Therefore, we hold that Judge McGarr's decision not to transmit the Trustee's plan to the ICC violated neither Section 77(d) of the Bankruptcy Act nor Bankruptcy Rule 8-303.

III

The RLEA argues that, in addition to not having jurisdiction to decide that the Trustee's plan was without merit, the reorganization court did not have the jurisdiction to order the Trustee to liquidate the Rock Island. The RLEA claims that Section 1174 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1174, for the first time permitted railroad reorganization courts to direct and control liquidations, and that Section 77 of the Bankruptcy Act, which applies to this case,[8] contains no authority for liquidation. Thus, the RLEA argues that the court may dismiss the petition for undue delay in reorganization, pursuant to Section 77(g) and Bankruptcy Rule 8-310, but it may not unilaterally determine that the debtor is unreorganizable and order liquidation.

[8]According to § 403 of the Bankruptcy Reform Act, some provisions of the new Bankruptcy Code are applicable to Section 77 cases pending before its enactment. But, Section 1174 is not one of those sections which applies to cases commenced under the Bankruptcy Act. Pub. L. No. 95-598, 92 Stat. 2683 (1978).

According to the RLEA's interpretation of Section 77, the reorganization court must either dismiss the petition for reorganization or continue reorganization. The RLEA does not acknowledge the possibility that liquidation may be the end result of a Section 77 reorganization. But the RLEA's view ignores the fact that it is difficult to mark the point at which an attempt to reorganize becomes a liquidation. It would be absurd to hold that the reorganization court may supervise liquidation of all but a small core railroad, yet cannot supervise the liquidation of much of the same property once the concept of a viable core has been rejected.

Section 77 does not set any limit on what portion, if any, of the debtor must be preserved pursuant to Section 77 proceedings. Section 77(b), 11 U.S.C. § 205(b) states:

> (b) A plan of reorganization within the meaning of this section . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the *sale of all* or any part of the property of the debtor. . . .

(emphasis added). In *New Haven Inclusion Cases*, the Supreme Court discussed the reorganization court's power to sell the assets of the New York, New Haven & Hartford Railroad ("New Haven") pursuant to § 77(b)(5). After noting that the reorganization court and trustees were "charged with the dual responsibility of conserving the debtor's estate for the benefit of creditors and preserving an ongoing railroad in the public interest," 399 U.S. at 420, the Court stated:

> The provisions of § 77 "doubtless suffice[d] to confer upon the [reorganization court] power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings." *Id.*, at 85-86; cf. 5 Collier, *supra*, ¶ 77.11, at 498-499. Together, the court and the Commission "unquestionably" had "full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be asserted against it." *Callaway v. Benton*, 336 U.S. 132, 147. One such power was precisely that which the

> Commission was about to propose that the reorganization court exercise—the power to confirm a plan of reorganization providing for "the sale of all . . . of the property of the debtor. . . ." Bankruptcy Act, § 77(b)(5), 11 U.S.C. § 205(b)(5).

399 U.S. at 421 (footnote omitted). *See also Matter of Lehigh Valley R.R. Co.*, 558 F.2d 137, 141-47 (3rd Cir. 1977) and cases cited therein.[9] These cases indicate that each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor, and liquidation may be an appropriate option.

The RLEA does not seriously urge dismissal of this action and resort to equity receiverships for liquidation,[10] but it does argue that an equity receivership is the only way that the creditors of the

[9]In *Lehigh Valley*, the Third Circuit stated that "these cases provide persuasive support for the proposition that the reorganization of a railroad may properly continue under Section 77 despite the fact that the enterprise is no longer capable of being reorganized into a working railroad." 558 F.2d at 146. The court concluded that the reorganization court had jurisdiction "to reorganize or liquidate the enterprise pursuant to § 77, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of the debtor's estate." 558 F.2d at 146-47.

The RLEA argues that the Lehigh Valley reorganization court's authority to liquidate under Section 77 comes from § 618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, which added § 601(b)(4), 45 U.S.C. § 791, to the Regional Rail Reorganization Act of 1973 ("Rail Act"), Pub. L. 93-236, 45 U.S.C. §§ 743, 744. But *Lehigh* and the cases discussed therein actually stand for the opposite result: the amendment authorized the continuation of Section 77 proceedings *despite* the special provisions in the Rail Act which transferred working railroad property to Conrail. 558 F.2d at 141-42.

[10]One of the reasons for enactment of Section 77 was to avoid equity receiverships for railroads. As stated in *New Haven Inclusion Cases*:

> Congress enacted [Section 77] in part "to prevent the notorious evils and abuses of consent receiverships," *New England Coal & Coke Co. v. Rutland R. Co.*, 143 F.2d at 184, of which one of the more egregious was the requirement of an ancillary filing and order of appointment in the federal court for every district in which the debtor had property.

399 U.S. at 426-27.

Rock Island may withdraw their assets from public use at this time. The RLEA claims that since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest. Thus, the liquidation order does not violate the public interest considerations required by Section 77.

In summary, the reorganization court had the jurisdiction under Section 77 to decline to accept the Trustee's Plan and to order the Trustee to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its discretion in exercising that jurisdiction. Because of our holding on the merits, it is unnecessary to reach the Creditors' argument that this case is moot.

The order appealed from is

AFFIRMED.

APPENDIX B

EXCERPTS FROM ORDER NO. 248
JUNE 2, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor.*	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

Order No. 248

This cause coming on as the hearing heretofore set by this Court by its Order No. 232 entered April 14, 1980, upon the Motion filed by William M. Gibbons, the Trustee herein and by the Indenture Trustees and the Henry Crown et al. intervenor interests and upon the direction of this Court to the said Trustee herein to file an application with the Interstate Commerce Commission for its report confirming the abandonment of the Debtor's ("Rock Island") total railroad system, the said application to be filed as described in Section 17 of the Milwaukee Railroad Restructuring Act (MRRA) and Section 1170 of the Bankruptcy Code, and

It appearing to the Court that the Interstate Commerce Commission has filed its report dated May 23, 1980 containing its advisory recommendations as prescribed under Section 17 of the MRRA as aforesaid and recommending total system discontinuance of service and abandonment, subject only to service continuity by other carriers at certain defined points and segments

pending possible transfer or sale to such carrier or other entities who may desire to continue such rail service, and

* * *

The Court having found that Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and having further found that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920); and

The Court having further found that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the MRRA by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. *Montpelier & Barre Railroad Co. Abandonment* (Dkt. No. AB-202F) ____ I.C.C. ____ (1980); *Northampton & Bath Railroad Co. Abandonment*, 354 I.C.C. 784 (1978); *Wellsville, Addison & Galeton Railroad Corp. Abandonment*, 354 I.C.C. 744 (1978); *Tennessee Central Railway Co. Abandonment*, 333 I.C.C. 443 (1968); *Okmulgee Northern Railway Co. Abandonment*, 320 I.C.C. 637 (1964); *Rutland Railway Corp. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Chicago, Attica & Southern Railroad Co. Abandonment*, 261 I.C.C. 646 (1946), and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate; and

The Court being fully advised in the premises,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier is hereby confirmed and decreed, such abandonment to be consistent, however, with the recommendations of the Interstate Commerce Commission pertaining to the transfer, sale or disposition of track and trackage rights as contained in the report of the Commission dated May 23, 1980; provided, however, that the reasonable period within which the Trustee shall retain the lines designated in Appendix D to the ICC Report shall not exceed 180 days from the date of this Order. That in entering this order, the Court is cognizant that a further order may be required with respect to passenger commuter service pursuant to Section 120 of the Rock Island Transition and Employee Assistance Act.

2. That no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17 of the Milwaukee Railroad Restructuring Act and the Trustee is hereby directed not to pay any such claim or to borrow for such purpose, any and all such claims or arrangements being hereby denied and prohibited by the Court.

Enter

Dated June 2, 1980

/ss/ Frank J. McGarr

U. S. District Judge

APPENDIX C

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The appellees in this case are William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company, The First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as Indenture Trustees, and Henry Crown et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island. Parent companies, subsidiaries and affiliates of the appellees are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R. R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R. R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R. R. Co.
Peoria Ry. Terminal Co.
Peoria Terminal Company
Pullman Railroad Company

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)
Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation
Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.

Office-Supreme Court, U.S.
FILED
MAR 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1239

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLEES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the employee protection provisions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, impose an unconstitutional taking of property in violation of the Just Compensation Clause of the Fifth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Discussion 8

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Brooks-Scanlon Co. v. *Railroad Commission*, 251 U.S. 396 11

ICC v. *Railway Labor Executives' Ass'n*, 315 U.S. 373 11

New York Dock Ry. v. *United States*, 609 F. 2d 83 11

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 9-10

United States v. *Gainey*, 380 U.S. 63 9

United States v. *Lowden*, 308 U.S. 225 10

Constitution and statutes:

United States Constitution, Fifth Amendment (Just Compensation Clause) 4, 10

Bankruptcy Act, Section 77, 11 U.S.C. 205 2

Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 901 *et seq.*:

45 U.S.C. (Supp. III) 904(a) 10

45 U.S.C. (Supp. III) 915(c) 10

Page

Constitution and statutes—(Continued):

Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. III) 10901 *et seq.*:

49 U.S.C. (Supp. III) 10903(b)(2) 10

49 U.S.C. (Supp. III) 11347 ..... 10, 11

Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 2

Section 106, 94 Stat. 401 ..... 2, 3, 5

Section 106(b), 94 Stat. 401 ..... 2, 4

Section 106(c), 94 Stat. 401 ..... 2, 4

Section 106(d), 94 Stat. 401 ..... 2, 4, 6

Section 106(e)(2), 94 Stat. 402 3

Section 110, 94 Stat. 403 ..... 2, 3

Section 110(e), 94 Stat. 403 6

Section 124, 94 Stat. 1959 6

Section 124(a), 94 Stat. 1959 8

Section 124(c), 94 Stat. 1959 6

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 5

Section 701, 94 Stat. 1959 5

Tucker Act, 28 U.S.C. 1491 5

28 U.S.C. 1252 4

Page

Miscellaneous:

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. (1980) 9, 12

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1239

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLEES

OPINIONS BELOW

The order of the court of appeals (J.S. App. 1a-2a) is not reported. The district court's orders of October 15, 1980 (J.S. App. 3a-6a), and October 16, 1980 (J.S. App. 7a), are not reported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 31a-32a) was entered on December 16, 1980. The notice of appeal (J.S. App. 33a) was filed on December 19, 1980, and the appeal was docketed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

STATEMENT

1. In March 1975, after experiencing several years of financial deterioration, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") petitioned the

United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. The Rock Island continued to operate for more than four and a half years under the protection of Section 77. After a strike further damaged its financial posture, however, the Rock Island ceased all operations in September 1979.

In January 1980, the reorganization court directed the Trustee of the Rock Island to prepare a plan for its liquidation, and the Trustee began selling the assets of the railroad. On June 2, 1980, the reorganization court authorized the Trustee to abandon the entire Rock Island system and ordered that no employee protection conditions be imposed.

On May 30, 1980, a few days before the reorganization court's abandonment order, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("the Rock Island Act"). Sections 106 and 110 of the Rock Island Act, 94 Stat. 401 and 403 (J.S. App. 35a-41a), required the Trustee, through the use of high priority federal loans, to provide labor protection benefits of up to $75 million to employees of the Rock Island who might be adversely affected by its cessation of operations. Specifically, Section 106(b) of the Rock Island Act, 94 Stat. 401, ordered the Interstate Commerce Commission to impose a fair and equitable labor protection arrangement within 30 days unless, prior to that time, the railroad and labor organizations representing its employees were able to agree upon a satisfactory arrangement. Section 106(c), 94 Stat. 401, provided that the bankruptcy court should immediately direct the Trustee and the labor organizations to implement the arrangement. Section 106(d), 94 Stat. 401, provided that orders of the Commission or of the bankruptcy court under Section 106(b) and (c) could not be stayed and that these orders could be reviewed

only in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit was required to rule on any such appeal within 60 days, and its decision would not be subject to further review. Section 106(e)(2), 94 Stat. 402, provided that labor protection claims would be treated as administrative expenses of the Rock Island estate.

Section 110 of the Rock Island Act required the Secretary of Transportation to guarantee obligations of the Rock Island for the purpose of providing employee protection under an agreement entered into under Section 106. It further provided that the guaranteed obligations would be treated as an administrative expense of the Rock Island estate and that the United States would incur no liability except in connection with those obligations. The amount guaranteed by the Secretary, and the liability of the Rock Island under a labor protection agreement, were limited to $75 million.

2. After the enactment of the Rock Island Act, the National Mediation Board offered its assistance in negotiating an employee protection agreement. The Rock Island Trustee, however, declined to participate in negotiations. On June 5, 1980, the Trustee, the indenture trustees under the mortgages of the Rock Island and representatives of certain creditor interests filed a complaint in the bankruptcy court seeking a judgment declaring the Rock Island Act unconstitutional and enjoining its enforcement. After a hearing on June 9, 1980, the district court entered a preliminary injunction enjoining the Commission, the Trustee, and the Secretary of Transportation from fulfilling their obligations under Sections 106 and 110 of the Rock Island Act (J.S. App. 13a-14a).

The district court explained its reasons for issuing the injunction in an oral statement from the bench (J.S. App. 15a-22a). Although the court suggested that the statute might have other constitutional problems, it based its

ruling on the fact that the labor protection provisions constituted an unconstitutional taking of the property rights of the creditors, in violation of the Just Compensation Clause of the Fifth Amendment (J.S. App. 17a-19a). The court concluded that if the procedures of the labor protection provisions of the Rock Island Act were permitted to go forward, the creditors of the estate would suffer irreparable harm (*id.* at 19a-20a). Therefore, the court enjoined (i) the Trustee and representatives of affected employees from entering into negotiations respecting a labor protection agreement; (ii) the Commission from considering the imposition of any such agreement; and (iii) the Secretary of Transportation from guaranteeing any loans or obligations of the Rock Island under the Rock Island Act (*id.* at 13a-14a).[1]

Because the district court had interrupted the procedures established by the Act before a labor protection plan could be devised, an expedited appeal to the Seventh Circuit, as contemplated by Congress, could not be taken.[2] Therefore, RLEA, the United States, and the Commission filed notices of appeal to this Court pursuant to 28 U.S.C. 1252.[3] RLEA, supported by the United States and the Commission, sought a stay of the preliminary injunction from Justice

---

[1]On June 20, 1980, the court denied a motion for reconsideration filed by the Railway Labor Executives' Association ("RLEA"), the United States and the Commission, again explaining that the labor protection provisions of the Rock Island Act constituted an unconstitutional taking (J.S. App. 26a-27a).

[2]The judicial review provisions of Section 106(d) covered appeals of orders entered under Section 106(b) and (c), which did not come into play until a labor protection plan was devised.

[3]RLEA's jurisdictional statement perfecting this appeal was docketed as No. 80-415. In our response in that appeal, the government urged that the June 9, 1980, injunction be vacated as moot in light of the passage of the Staggers Rail Act.

Stevens in order to allow the procedures mandated by the Rock Island Act to go forward pending a determination of its constitutionality. On June 28, 1980, Justice Stevens denied the application (J.S. App. 43a-47a). Acknowledging that "[n]ecessarily, my views are tentative," Justice Stevens stated that the district court was "probably correct" in finding that the labor protection provisions of the Rock Island Act would constitute a taking of the estate's property (J.S. App. 47a). Justice Stevens rejected the argument that the estate would suffer no irreparable harm if labor protection payments were made and the Rock Island Act were later determined to constitute a taking, because he doubted that the creditors would have a remedy against the government by a suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491: "[W]hile the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, * * * it is obvious that his suggestion is equivocal" (J.S. App. 47a). The application for a stay was then resubmitted to the full Court, which denied the request on July 2, 1980, by a 5-3 vote.

3. In response to the district court's injunction, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which was signed into law on October 14, 1980. Section 701 of the Staggers Rail Act, 94 Stat. 1959, amended the Rock Island Act in a number of significant respects.[4] Section 701 re-enacted the provisions of Section 106 requiring the Trustee to negotiate a labor protection agreement. However, the time for the parties to negotiate the agreement was shortened from 10 to five days, and the time for the Commission to impose a fair and equitable arrangement, in the absence of an agreement, was shortened from 30 to 15 days.

---

[4]The relevant provisions of the Rock Island Act as amended by the Staggers Rail Act are set forth at J.S. App. 35a-42a.

The judicial review provisions of Section 106(d) were also changed. The amended section no longer includes the prohibition against staying orders of the Commission or the bankruptcy court issued under the Rock Island Act or the bar to further review of the Seventh Circuit's decision. Moreover, the Staggers Rail Act added a new Section 124 to the Rock Island Act (94 Stat. 1998). This Section closed the jurisdictional loophole that had prevented the district court's decision from being appealed expeditiously to the Seventh Circuit, by providing that "[n]otwithstanding any other provision of law, any appeal from * * * any decision of the bankruptcy court with respect to the constitutionality of any provision of [the amended Rock Island] Act * * *" must be taken to the Seventh Circuit, sitting en banc, and must be decided within 60 days.

The Staggers Rail Act also added language clarifying Congress' intention that monies paid out by the estate could be recovered from the United States in the event that the employee protection provisions of the Rock Island Act subsequently were held to be a taking. Section 110(e) of the Rock Island Act was amended to make explicit that the $75 million payment ceiling was a limitation of the liability of the United States to the employees of the railroad, not to the estate. And Section 124(c) was added to the Rock Island Act, providing:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

4. On October 6, 1980, in light of the new statute, RLEA and the United States, supported by the Commission, moved the district court to vacate its injunction of June 9,

1980.[5] The movants argued that passage of the Staggers Act effectively mooted the June 9 injunction because the injunction applied to a statute no longer in existence and had no application to the re-enacted but nevertheless new and distinct obligations concerning labor protection that the Staggers Rail Act imposed on the Commission and the other parties. Moreover, the movants argued that the Staggers Rail Act amendments eliminated the features of the original Rock Island Act that the district court had concluded would lead to irreparable injury unless enjoined—particularly by expressly providing that a Tucker Act remedy is available if the labor protection provisions are ultimately found to effect a taking of property—and therefore that the procedures established in the Staggers Rail Act should be permitted to go forward.

On October 15, 1980, the district court denied the motion to vacate and issued a new injunction preventing the Commission, the Trustee and the Secretary of Transportation from taking any action respecting the labor protection provisions of the "Rock Island Act as amended and re-enacted by the Staggers Rail Act" (J.S. App. 3a-6a). The court held that the "Staggers Rail Act does not cure the defects found in the Rock Island Act" (*id.* at 5a) and that "[t]he Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property" (*id.* at 6a). The Staggers Rail Act did not eliminate the likelihood of irreparable injury to the estate, in the court's view, because (*id.* at 5a):

> The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further,

---

[5] Although the Staggers Rail Act did not become law until October 14, 1980, the district court held a hearing on the motion on October 7, 1980, on the expectation that the President would sign the bill.

> the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

The court's order did not discuss the effect of the express provision of a Tucker Act remedy on the irreparable harm question. On October 16, 1980, the court *sua sponte* entered an order (J.S. App. 7a) amending its order of the previous day by changing the phrase "the court orders the issuance of a preliminary injunction," which appears twice, to "the court orders the continuance of the preliminary injunction."

RLEA, the United States and the Interstate Commerce Commission appealed the order granting the preliminary injunction to the Seventh Circuit sitting en banc, pursuant to Section 124(a) of the amended Rock Island Act (J.S. App. 41a-42a). Relying on the Staggers Rail Act, the court of appeals unanimously denied a motion filed by the private appellees to dismiss the appeal for lack of jurisdiction in light of the pending appeal to this Court in No. 80-415 (J.S. App. 2a). On the merits, the court affirmed without opinion by an equally divided vote (*ibid.*).[6] RLEA then docketed this appeal.[7]

DISCUSSION

1. We agree with appellant (J.S. 17-29) that this case presents a substantial federal question. The district court, affirmed by an equally divided court of appeals, has held an Act of Congress unconstitutional with only cursory explanation. The invalidated statutory provisions are central to Congress' efforts to deal with the many problems resulting

---

[6]Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse. Judges Swygert, Bauer and Wood voted to affirm. Judges Cummings and Pell did not participate.

[7]The federal appellees also filed a notice of appeal, but rather than docket a separate appeal we are simply supporting the jurisdictional statement filed by RLEA.

from the collapse of the Rock Island rail system, and they embody important congressional policies with respect to the protection of adversely affected employees. The importance attached to these provisions by Congress is manifested by the fact that it enacted them on two separate occasions, making several amendments in the Staggers Rail Act specifically responsive to constitutional objections to the original statute voiced by the district court and by Justice Stevens.[8]

The courts below gave virtually no explanation for exercising "the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The district court's first order was supported only by a brief, conclusory statement issued extemporaneously from the bench. The district court's explanation of its second order did not address in any meaningful way the changes made by Congress in the Staggers Rail Act and, indeed, made no reference at all to the explicit provision of a Tucker Act remedy. In view of this failure to explain the decision that these provisions are unconstitutional, a difficult question on which the court of appeals was equally divided, plenary review by this Court is plainly warranted.

2. On the merits, we submit that the district court erred in concluding that the amended Rock Island Act effects an unconstitutional taking of property. As this Court has recognized on many occasions, there is no "set formula" for determining whether a governmental obligation effects a "taking" of private property or, alternatively, imposes a permissible regulatory burden. See, *e.g.*, *Penn Central*

---

[8]Congress explicitly stated that it was amending the Rock Island Act in order to allow the processes of the Act to go forward immediately by curing the problems that had prevented this Court from staying the June 9, 1980, injunction. H.R. Conf. Rep. No. 96-1430, 9th Cong., 2d Sess. 137 (1980).

Transportation Co. v. *New York City*, 438 U.S. 104, 123-124 (1978). In the specific instance of the imposition of protection for railroad employees, however, the Commission has long had a policy of conditioning its approval of, *inter alia*, abandonment applications—a statutory prerequisite to a railroad's cessation of operations—on the requirement that the abandoning railroad provide certain protections to employees who will be adversely affected by the abandonment. In 1976 and 1979, Congress itself specifically provided for the imposition of labor protection as a condition of railroad abandonments. See Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. III) 10903(b)(2) and 11347; Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 904(a) and 915(c).

This Court has consistently approved the Commission's imposition of labor protection as a permissible regulatory burden on interstate railroads, rejecting constitutional challenges to this policy. In *United States* v. *Lowden*, 308 U.S. 225, 234-240 (1939), the Court held, in the context of a railroad consolidation, that mitigation of harm to employees is in the public interest and protects the orderly and efficient operation of the national railroad system. Rejecting the contention that the requirement of labor protection is a taking in violation of the Fifth Amendment, the Court stated (308 U.S. at 240):

> Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. * * * Moreover we cannot say

> that this limited and special application of the principle, fully recognized in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process.

And this Court has established that this authority to impose labor protection exists in connection with a railroad abandonment just as with a consolidation. *ICC* v. *Railway Labor Executives' Ass'n*, 315 U.S. 373, 377 (1942).

In light of this longstanding policy, it is clear that the Rock Island Act does not impose a new, unforeseeable obligation on the estate of the Rock Island. Investors in the railroad industry are aware from the start that their right to abandon railroad operations is circumscribed by the need to consider the public interest, which includes labor protection. The Rock Island Act merely reaffirmed the railroad's existing obligation, while providing a means for funding that obligation and *limiting* it to $75 million.[9] The passage of the Act did not transform into a "taking" of private property this longstanding obligation that has always been viewed as permissible regulation.

Nor does the fact that the district court ruled, in January 1980 and again in July 1980, that the Rock Island was not reorganizable on an income basis and had a right to cease operations and liquidate (see *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920)) support the view that the Rock Island Act effected a taking. If an obligation imposed on an enterprise is properly viewed as a regulation (for example, an obligation to pay for the cleanup of oil spills), it is not converted into a "taking" merely because the

---

[9]Under 49 U.S.C. (Supp. III) 11347, the minimum amount of labor protection permitted is full protection against adverse effects for the lesser of six years or the period of the individual's employment. See *New York Dock Ry.* v. *United States*, 609 F. 2d 83 (2d Cir. 1979).

enterprise becomes insolvent. Moreover, as Congress explained when it enacted the Staggers Rail Act, if the obligation to provide labor protection automatically evaporates when a liquidation is authorized, the consequence will be "to promote liquidations, to the detriment of the employees and the public interest." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980). In sum, the Rock Island Act merely reaffirmed and limited a preexisting and potentially larger obligation of the estate, and that obligation is not converted into a taking by the unreorganizability of the estate.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission

MARCH 1981

DOJ-1981-03